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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DAVID G. LUPO, JAMES STEMMLER, JANE S. TSCHUDY, THOMAS W. YAGER, MICHAEL J. KICKHAM, E. LOUIS WERNER and RONALD B. BURT,
Petitioners,

v.

IRVING COHEN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether res judicata allows a litigant to pursue the same claim arising from the same alleged offending conduct in both 1) his expansive application for Rule 11 sanctions (in the amount of One Million Dollars) wherein he sought the entirety of attorney's fees and costs incurred in the underlying litigation, and 2) in a subsequent civil action for malicious prosecution when the District Court in the Rule 11 proceedings considered *all conduct* of the alleged offending parties in bringing and maintaining the entirety of the underlying action, and awarded $100,000 of Rule 11 sanctions?

II. Whether the doctrines of res judicata and satisfaction of judgment operate to bar a malicious prosecution action in whole or in part once Rule 11 sanctions are paid as a result of a final judgment on the identical claim that was litigated in a previous proceeding based on Rule 11, common law principles and 28 U.S.C. Section 1927?

LIST OF PARTIES

The parties to this proceeding are as follows: The Petitioners are attorneys David G. Lupo and James Stemmler, and their former clients Jane S. Tschudy, Thomas W. Yager, Michael J. Kickham, E. Louis Werner and Ronald B. Burt. The client Petitioners were investors in various motion picture limited partnerships. Respondent Irving Cohen was, individually and through partnerships and corporations, the organizer and promoter of various motion picture limited partnerships, and was a defendant in an underlying securities fraud action brought by Messrs. Lupo and Stemmler in behalf of the client Petitioners herein and others. Mr. Cohen sued below the above named Petitioners as well as Jack Bastien, Arthur F. O'Hare and Arla Reed, defendants below, who do not join Petitioners herein and are thus Respondents.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, David G. Lupo, James Stemmler, Jane S. Tschudy, Thomas W. Yager, Michael J. Kickham, E. Louis Werner and Ronald B. Burt respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-captioned proceeding on February 21, 1991.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the .Eighth Circuit is reprinted in the Appendix hereto

at page 1a.[1] The Eighth Circuit's opinion has been published at 927 F.2d 363 (8th Cir. 1991).

The Order of the three-judge panel denying rehearing by the panel and rehearing en banc is reprinted in the Appendix hereto at page 11a.

The Order of the United States District Court for the Eastern District of Missouri dismissing Respondent's action for malicious prosecution on res judicata principles is reprinted in the Appendix hereto at 5a. This opinion has not been published.

JURISDICTION

On February 28, 1991, the United States Court of Appeals for the Eighth Circuit issued its opinion reversing the District Court's Order dismissing Respondent Irving Cohen's suit alleging malicious prosecution against Petitioners and others who do not join this Petition. Jurisdiction of the District Court had been asserted by way of diversity of citizenship. 28 U.S.C. Section 1332. Rehearing was sought, but on April 16, 1991, the Court of Appeals denied the request for rehearing en banc because less than a majority of the Eighth Circuit's active judges voted to rehear the matter en banc. Petitions for rehearing by the panel were denied the same day. The Court of Appeals' mandate issued on April 26, 1991.

Jurisdiction of the Court is invoked under 28 U.S.C. Sections 1254(1) and 2101(c).

RULES INVOLVED

Rule 11 of the Federal Rules of Civil Procedure is set forth in the Appendix at 124a. The Notes of the Ad-

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[1] References to the Appendix herein will read (1a) referring to Appendix page 1, and so on. References to the record below will be as follows: (App.) will refer to the Joint Appendix filed below, (Add.) will refer to the Addendum to the Brief of Appellees Bastien, O'Hare, Tschudy, Yager, Reed, Kickham and Werner, filed below.

visory Committee on Rules pertaining to Rule 11 are set forth in the Appendix at 127a-132a.

STATEMENT OF THE CASE

This case presents the question of whether Rule 11 sanctions imposed for the entirety of the conduct of a lawsuit (its commencement and maintenance) trigger the application of res judicata to bar a subsequent lawsuit for alleged malicious prosecution arising from the same facts and occurrences.

The District Court dismissed Respondent's malicious prosecution action on the grounds that, under the transactional approach to res judicata approved by Missouri, the Eighth Circuit and the American Law Institute's Restatement (Second) of Judgments, Respondent's malicious prosecution claim was identical to the claim he presented and litigated in his Rule 11 proceedings (5a-10a).

The Eighth Circuit chose not to address the "same transaction" test, and reversed, focusing on technical differences between a Rule 11 motion and a civil action for malicious prosecution, apparently unwilling to consider a Rule 11 application as a "claim" for res judicata purposes (3a).

The relevant history of these proceedings can be summarized briefly. Petitioners David G. Lupo and James Stemmler are St. Louis attorneys who represented eight individual plaintiffs in a complex securities fraud action brought in the United States District Court for the Eastern District of Missouri. *Bastien* v. *Rowland & Co. (Bastien I)*, 815 F.2d 713 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 160 (1987). Defendants in that action included Respondent herein, Irving Cohen. Lupo and Stemmler's clients, a group including Petitioners Jane S. Tschudy, Thomas W. Yager, Michael Kickham, E. Louis Werner and Ronald B. Burt, had invested in numerous motion

picture limited partnerships organized and operated by the defendants, including Mr. Cohen.

In their original complaint in the underlying case, the Plaintiffs in the *Bastien* action alleged that Defendants (including Respondent) had defrauded them of their investment capital by misrepresenting available tax benefits, failing to disclose the true cost paid for the movies, and organizing the partnership to benefit general partners without returning a profit to limited partner investors. Violations of Rule 10b(5), common law fraud, breach of fiduciary duty and conversion were alleged. In February, 1984, Plaintiffs amended this complaint by adding an additional count alleging a violation of the Racketeer Influenced Corrupt Organizations (RICO) Act. The defendants, including Mr. Cohen, filed motions for summary judgment a few weeks before trial, which was set for March 17, 1986. The District Judge overruled these motions for summary judgment on March 13, 1986 (74a-76a). On March 17, 1986, before commencing the trial, the District Judge, upon being advised that the parties could not agree to a settlement, orally set aside his order of March 13, 1986 and permitted the Defendants to orally resubmit their motions for summary judgments.

The District Court then gave Plaintiffs below three (3) days to submit evidence to a jury to prove a prima facie case for each of the six (6) claims of each of the eight (8) Plaintiffs against each of the forty-three (43) defendants. The case had been set for an eight-week jury trial. After three (3) days of trial, the District Judge dismissed the jury and gave the parties seven days to submit briefs on the summary judgment motions. On March 31, 1986, the Court orally sustained the summary judgment motions in open court.[2] The Eighth Circuit Court of

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[2] It is important for this Court to examine these "summary judgments," *Bastien v. R. Rowland & Co., Inc. et al.*, 857 F.2d 482 (8th Cir. 1988), *cert. denied*, 109 S.Ct. 2101 (1989), which the Eighth Circuit concludes actually were never entered (30a). Judge Gunn

Appeals affirmed (36a-39a) and this Court thereafter denied a Petition for Writ of Certiorari. 108 S. Ct. 160 (1987).

On May 7, 1986 Respondent Cohen and all the other Defendants in the *Bastien* action filed an expansive Joint Application for Attorneys' Fees and Expenses incurred in defense of that case (61a-72a). The application sought approximately One Million Dollars in sanctions under Rule 11, 28 U.S.C. Section 1927, and the 'inherent powers' of the court (common law principles similar to Cohen's instant common law action). Petitioners Lupo and Stemmler responded, point by point (44a-60a), and Mr. Lupo prepared an extensive affidavit regarding his prefiling inquiry (81a-114a). The application never specified any paper signed in violation of Rule 11 (61a-72a).

After a long delay for the resolution of the appeal of the *Bastien* matter by the Eighth Circuit, the District Court held sanction hearings in July of 1987. Respondent did not file his petition or any motion asserting malicious prosecution until after August 7, 1987—the date the District Court imposed Rule 11 sanctions. Sanctions totalling $100,000 were imposed—$50,000 upon "Counsel

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orally granted motions for summary judgment sought by the *Bastien* defendants, including Respondent in open court. Petitioners Lupo and Stemmler argued that a courtroom minute sheet (73a) filled out by the clerk and entered in the record fulfilled the Rule 58 "separate document" [125a] requirement. But the Court of Appeals concluded ". . . in actuality there was no entry of judgment on the merits . . ." (30a). The Court of Appeals then stated that the issue of jurisdiction of that court to hear the appeal in the *Bastien* case was not raised and was therefore *waived by the parties.* (31a). Petitioners submit that there can be no waiver of jurisdictional requirements. *Pennsylvania v. Union Gas Co.*, 490 U.S. 545, 558 (1989). Also see *Farmers Elevator Mutual Ins. Co. v. Carl Austad and Sons, Inc.*, 343 F.2d 7, 18 (8th Cir. 1965) and Rule 12(h)(3). Fed. R. Civ. Proc. Petitioners, who below raised a Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted (12a-13a), hereby invite this Court to examine these irregularities.

for Plaintiffs"[3] and $50,000 upon their clients (including, among others, Petitioners Tschudy, Yager, Kickham, Werner and Burt) under the provisions of Rule 11 of the Federal Rules of Civil Procedure. The Rule 11 order (40a-43a) contained no language specifying which pleadings or papers were signed in violation of the rule, and stated only that "the conduct of the litigation . . . *which comprises the bulk of the filings*, was frivolous and abusive . . ." (Emphasis added) (42a).

The Court of Appeals later was forced to hazard a guess as to the identity of the violative pleading in order to affirm[4] (34a) *Bastien v. R. Rowland & Co. (Bastien II)*, 857 F.2d 482 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 2101 (1989).

The distinguishing and critical feature of Respondent's Rule 11 application was that it sought sanctions on the

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[3] This "general" imposition of Rule 11 sanctions against unidentified "counsel" or a law firm has been recently rejected by this Court. *Pavelic & LeFlore v. Marvel Entertainment Group*, —— U.S. ——, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989).

[4] Petitioners point out that the Court of Appeals "backdoored" Petitioners Lupo and Stemmler by "identifying" the "violative paper" only in its decision, identifying the amended petition filed by Petitioners in the underlying action alleging violation of the Racketeer Influenced Corrupt Organizations (RICO) Act. The Court of Appeals stated: "The amended petition adding the RICO count certainly meets the requirement of a pleading signed in violation of Rule 11." (34a). Petitioners submit that the Court of Appeals went beyond mere review and "rewrote" the District Court opinion, which identified no such violative pleading. (40a-43a). After the RICO count was added by amendment, that count itself was amended by order of the District Court. The parties thereafter went to trial on the twice-amended petition *without objection.*

Further, had the District Court not, at that time, been following the Eighth Circuit's flawed reasoning concerning RICO threshold requirements in *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986), no amended petition would have been necessary in the original *Bastien* case. *Superior Oil* has now been overruled by *H. J. Inc. v. Northwestern Bell Telephone Co., a Subsidiary of U.S. West, A.B.C.*, 829 F.2d 648 (8th Cir. 1987).

basis of the *entire record in the Bastien case*, including *every pleading* filed by Messrs. Lupo and Stemmler in behalf of their clients, from the initial Complaint forward. Mr. Cohen's Rule 11 application contained a "laundry list" of alleged violations (62a-63a), and stated "Plaintiffs and their counsel can have no excuse for their *commencement* and *maintenance* of this frivolous action. . . ." (64a). (Emphasis added).[5]

Further, counsel representing Mr. Cohen's interests at a sanctions hearing before the District Court argued on the record that Rule 11 sanctions should be imposed to shift the entirety of defense costs, and to remedy both the alleged bad faith conduct of the litigation, and the commencement of the litigation in the first place:

> Mr. Clear: First, it is perfectly permissible to award to us the entirety of our fees and costs if you conclude based on the record before you and your familiarity with this matter that it should never have been brought in the first place, that it was frivolous and that it was conducted in an abusive fashion. Actually that's in the alternative. Under Rule 11, even a case with some semblance of merit if it is conducted in an abusive fashion can give rise to sanctions or a case which is utterly frivolous even if it's conducted in good faith.
>
> In this case we have with the unusual commingling of both, we have an utterly frivolous case which was conducted in an utterly abusive fashion.

(Add. at A-10).

> If you look for example at our application for fees and costs, you will discover that 97.3 percent of the fees and expenses incurred by my client until summary judgment was granted occurred after the amendment to Rule 11. So we are dealing almost en-

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[5] See Petitioners' Lupo and Stemmler's Response (44a-60a) and Mr. Lupo's affidavit regarding his pre-filing inquiry (81a-114a).

> tirely with a post-amendment environment for the costs that were incurred in this case.
>
> This record eloquently supports the conclusion that the case was handled in an abusive fashion. . . .
>
> I might also note that I did a little calculation, Your Honor. Eighty-four percent of the fees and cost incurred by Rowland through summary judgment occurred after you assumed control of the case, so that we are not here dealing with substantial amounts which were incurred under the supervision of other judges or magistrate. You have lived with us during the worst of it and you have observed it firsthand . . . .
>
> I don't think $200,000 would be sufficiently punitive, but it's a matter of judgment and discretion and that's in your hands. . . .

(Add. at A-13 through A-15).

The *Bastien* defendants, including Mr. Cohen, filed affidavits with the District Court in support of their Rule 11 Application, detailing attorney's fees and defense costs approaching One Million Dollars ($1,000,000.00). Further, in his Application, Mr. Cohen sought retribution for alleged bad faith conduct, invoking the deterrent aspect of Rule 11:

> Plaintiffs and their counsel can have no excuse for their commencement and maintenance of this frivolous action. . . .
>
> There is a remedy for such deception and abuse. True it is reserved for the exceptional case. But this is that case. *Defendants submit that the only means to justly remedy the complete lack of good faith manifested by Plaintiffs and their counsel and to prevent a repetition of such conduct in future litigations is to award attorney's fees and expenses. Because Plaintiffs' bad faith permeated this case from the first press conference to the very end of the case. Defendants respectfully submit that it is proper to re-*

> *quire Plaintiffs or their counsel to pay all reasonable attorney's fees and expenses incurred in this case.*
>
> The conduct of the Plaintiffs' counsel in this case has multiplied the proceedings unconscionably. . . . Defendants respectfully submit that *this case is ripe for application of the deterrents envisioned by* Rule 11.

(664a, 69a-70a). (Emphasis added).

On the basis of this Application, the District Court imposed Rule 11 sanctions, as aforesaid. Messrs. Lupo and Stemmler's clients subsequently paid the sanctions after the Eighth Circuit affirmed and this Court denied a Petition for a Writ of Certiorari. 109 S.Ct. 2101 (1989).

After the imposition and partial payment of these sanctions, Messrs. Lupo and Stemmler and their former clients were promptly subjected a second time to Mr. Cohen's claim when he filed this action. Mr. Cohen's former co-defendants Harold Rand and R. Rowland & Co. filed a similar state court action in the Circuit Court of the City of St. Louis (Cause No. 892-00606). Both suits alleged malicious prosecution and seek to recover attorneys' fees and costs—the same relief sought by their previous Rule 11 Application.

On motion, the District Court dismissed Respondent's malicious prosecution action. The Eighth Circuit reversed and Petitioners now seek this writ.

REASONS FOR GRANTING THE WRIT

The 1983 amendments to Rule 11 of the Federal Rules of Civil Procedure inaugurated a new era of sanction imposition in federal practice. However, the recent dramatic increase in sanctions orders has done little to achieve its ultimate goal of streamlining federal practice.[6] The Notes of the Advisory Committee on Rules pertaining to the 1983 amendments indicate deterrence is the major goal (127a-132a). Also see *Cooter & Gell v. Hartmarx Corp.*, —— U.S. ——, 110 S. Ct. 2447, 2454, 110 L.Ed.2d 359 (1990).

Unfortunately, decisions providing clear guidance on Rule 11 have been few. This Court has recently intervened in an attempt to clarify some issues and provide much needed guidance. In *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, —— U.S. ——, 111 S. Ct. 922, 112 L.Ed.2d 1140 (1991) and *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 110 S. Ct. 456, 107 L.Ed.2d 438 (1989), the Court addressed the issues of who the Rule applies to and why. In *Cooter & Gell, supra*, the Court clarified that voluntary dismissal does not affect the jurisdiction of a District Court to impose Rule 11 sanctions, that all Rule 11 sanction orders are subject to review on an "abuse of discretion" standard only, and that Rule 11 cannot be used to shift costs of an appeal of the Rule 11 order itself.

Still, serious questions, like the one at hand, exist. Issues such as those presented here require resolution if the Rule is to do anything but *increase* the amount of litigation in the federal courts. The Rule reads simply enough, but its inconsistent application and the ramifications of its use (such as in the instant case) have left federal

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[6] A review of West's Federal Practice Digest 3rd reveals that Rule 11 indeed may be viewed as a disaster. Key number 2721, Federal Civil Procedure, contains more than 50 pages of Rule 11 decisions, many of which are appellate decisions, in the *current pocket part alone.*

practice more a mine field than the level field sought by the Advisory Committee. Proper application of Rule 11 is critical, in light of the "chilling effect" the Rule has on counsel and litigants. This has been pointed out by commentators, and, more recently, by Justice Kennedy:

> It is not the business of this Court to prescribe rules "redistributing litigation costs" in a manner that discourages good-faith attempts to vindicate rights granted by the substantive law.

Business Guides, Inc. v. Chromatic Communications, Inc., *supra*, at 111 S.Ct. 941 (Kennedy, J., dissenting), citation omitted.

The instant case presents the question of whether res judicata allows a subsequent malicious prosecution action where Rule 11 was used in an attempt to shift the entire cost of litigation—and where the entire conduct of the litigation was put in issue in the Rule 11 proceedings. Such a total cost redistribution is exactly what the Respondent sought in his previous Rule 11 proceedings. He did not seek to shift only those costs associated with "discrete events" [7]—he sought to shift the costs of his *entire defense* by way of Rule 11. Petitioners submit that the well-established doctrine of res judicata prevents relitigation of this claim. See *Nevada v. United States*, 463 U.S. 110 (1983).

The question at hand is exceedingly important, owing to the ever-increasing employment of Rule 11. More and more, Rule 11 motions are being filed and prosecuted, usually at the end of litigation, seeking much more than recompense for a few discrete events. Rather, parties (particularly defendants using the Rule against unsuccessful plaintiffs) increasingly seek most or all of their attorneys' fees and costs by way of Rule 11. Thus, reso-

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[7] The type of specific or piecemeal use of Rule 11 envisioned by Justice O'Connor in her opinion for the Court in *Business Guides*, *supra*, at 111 S.Ct. at 934.

lution of this question is critical and will give guidance to many.

Petitioners submit that, while Rule 11 remains *entirely procedural, it effectively creates a new "tort" of "negligent* prosecution," *especially when used to shift the entirety of litigation costs,* as here. It is time for an expansive Rule 11 claim to be seen and recognized as no less than it is—a *claim* cognizable under the law and triggering res judicata principles. This analysis was suggested by Justice Kennedy in dissent in *Business Guides, supra,* at 111 S.Ct. 941. In his dissent, Justice Kennedy makes two observations cogent to res judicata analysis in this case:

> As interpreted by the majority, Rule 11 "redistribut[es] litigation costs" much like the fee-shifting theory rejected in *Alyeska Pipeline. The majority's distinction between an "appropriate sanction" under Rule 11 based on a discrete event" and the fee-shifting at issue in Alyeska Pipeline, ante at 934, breaks down in a case like this one where the "discrete event" was the filing of the lawsuit and the "appropriate sanction" was the payment of respondents' attorney's fees coupled with dismissal of the suit. . . .*
>
> *As interpreted by the majority, Rule 11 creates a new tort of "negligent prosecution" or "accidental abuse of process. . ."* [Citations omitted]. (Emphasis added).

Id. at 941.

Petitioners urge that use of Rule 11 to recoup the entirety of litigation costs from an unsuccessful opposing party amounts to litigation of a claim for res judicata purposes. Any subsequent civil filing for damages (malicious prosecution in this case) should be barred. This issue was not addressed in *Business Guides, supra.* Mr. Cohen would never be permitted under res judicata to bring a subsequent intentional tort action after litiga-

tion a negligence claim arising from the same wrong or "nucleus of operative facts." Similarly, litigation of Cohen's procedural claim under Rule 11 should bar, by res judicata, the relitigation of the same claim under any other theory, be it substantive or procedural in origin. The Eighth Circuit disagreed, holding that the "substantive-procedural" distinction made all of the difference (3a-4a), but never really explained why res judicata could not still apply. Petitioners submit that it does. This Court needs to confront this question.

Further, the Eighth Circuit's instant opinion would do away with the *transactional approach* to res judicata as previously adopted by the American Law Institute's Restatement (Second) of Judgments, most of the Circuits and the Eighth Circuit itself. *Lane v. Peterson*, 899 F.2d 737, 742 (8th Cir. 1990).

Res judicata is a doctrine much more firmly entrenched in the law than Rule 11; it is a fundamental precept of common law adjudication. It has "the salutary effects of protecting adversaries from the expense and vexation of multiple lawsuits, conserving the limited time of judges, and fostering reliance on decisions of courts." *Poe v. John Deere Co.*, 695 F.2d 1103, 1107 (8th Cir. 1982).

The Eighth Circuit here, however, if not reversed, will either create a special exception to res judicata for such expansive Rule 11 claims, and/or seriously erode the tried-and-true precedents forming the basis of the doctrine. This Court has already spoken on the issue of "exceptions" to res judicata. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398-399, 101 S.Ct. 2424, 2428, 69 L.Ed.2d 103 (1981). However, even if such an exception were created, res judicata would still bar Cohen's common law action because common law principles were invoked as one of the bases of his sanctions proceedings (61a).

Under the Eighth Circuit's ruling, litigants will be encouraged to seek both Rule 11 sanctions and malicious prosecution damages—frustrating the purposes of Rule 11 by increasing "satellite litigation," (131a-132a) and further clogging already quagmired District Court dockets. More basic policy questions are also raised: Why should the law allow a litigant to be subjected to successive Rule 11 and malicious prosecution claims based on the same conduct? Why is not one of the two (chosen by the claimant) enough?

Petitioners urge the Court to grant a Writ of Certiorari herein so that all these issues can be resolved. The expansive use of Rule 11 and the reach of the well-established doctrine of res judicata must be reconciled.

I. RESPONDENT'S CLAIM FOR MALICIOUS PROSECUTION IS IDENTICAL, FOR RES JUDICATA PURPOSES, TO THE CLAIM HE LITIGATED IN PRIOR RULE PROCEEDINGS.

Federal common law applies in a diversity case to determine the res judicata effect of a prior federal court judgment that was based on a claim arising under federal law. *Poe v. John Deere Co.*, 695 F.2d 1103, 1105 (8th Cir. 1982). Thus, federal common law principles of res judicata would apply in determining the res judicata effect of the District Courts' sanctions judgment in the *Bastien* litigation.

As a practical matter, however, the federal and Missouri common law of res judicata (applied by the District Court below) are the same. *See Lane, supra,* and *Varnal v. Kansas City,* 481 S.W.2d at 575, 579 (Mo. Ct. App. 1972). Missouri employs "transactional" res judicata, and therefore the District Court correctly applied the "transactional" approach to res judicata in reaching its decision. See *Grue v. Hensley,* 210 S.W.2d 7, 10 (Mo. 1948).

This Court has addressed the issue of what constitutes identical claims for purposes of res judicata. In *Nevada v. United States, supra,* the Court determined that res judicata applied and barred a subsequent lawsuit after the United States had sought adjudication of certain water rights in an initial action. The Court found that the pleadings and the judgment in the prior case involved nothing less than a claim for the full "implied-reservation-of-water rights" that were due to an Indian reservation *and the prior suit was not limited to water rights for irrigation. Id.* at 131. (Emphasis added). Thus res judicata precluded a subsequent claim by the United States for irrigation water rights.

The importance of this precedent to the instant case cannot be minimized. It means that Respondent's failure to limit his Rule 11 application to less than the entire conduct of the underlying *Bastien* litigation is fatal to his claim. By seeking remedy under Rule 11 for the *entirety* of the *Bastien* litigation, from its commencement to its conclusion, Mr. Cohen failed to reserve any claim to litigate anew in his malicious prosecution action. *He has already sought and obtained relief for the same wrongs he addresses again in the instant case.*

Further, the Eighth Circuit ignored its own recent precedent in overruling the District Court. In *Lane v. Peterson,* 899 F.2d 737 (8th Cir. 1990), the Court acknowledged its adoption of the "transactional approach" to res judicata pronounced in the American Law Institute's Restatement (Second) of Judgments:

> This circuit has adopted the position of the Restatement (Second) of Judgments in determining whether two causes of action are the same for res judicata purposes. *Generally, under this approach a claim is barred by res judicata if it arises out of the same nucleus of operative facts as the prior claim.* [Citations omitted]. The Restatement (Second of Judgments provides:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, original, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Restatement (Second) of Judgments § 24 (1980). *Lane, supra* at 742. (Emphasis added). Also see *Nevada v. U.S., supra.*

Any fair and logical examination of the instant case results in the conclusion that Cohen's all-encompassing Rule 11 application and his later suit for malicious prosecution arose from the very same acts, the very same conduct, and thus the very same "nucleus of operative facts." Cohen admits this in his Brief below, at page 19. Thus, under the law, they constitute the exact same "claim" for res judicata purposes.

Respondent simply cannot evade the clear consequences of his own choice. Given the chance to pursue his claim under either theory, or both theories, he chose Rule 11.[8]

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[8] It should be remembered that the District Court waited, at Cohen's request, some fifteen months to set hearings on the sanctions motion so that the appeal of the underlying Bastien case to the Eighth Circuit could be heard and decided. This ensured that Cohen had plenty of time to plan his strategy *and* plenty of time to assert

The choice was informed and calculated.[9] Now the Eighth Circuit cannot be allowed to carve out an "exception" to res judicata, ignoring transactional analysis. This is so no matter how grievous the result.

As stated by this Court in *Federated Department Stores, Inc. v. Moitie, supra,* res judicata applies without regard to the rightness or wrongness of a judgment, its effect on the parties, or any court's perception of "equity" or "simple justice":

> This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin v. Traveling Men's Assn.*, 283 U.S. 522, 525, 51 S.Ct. 517, 518, 75 L.Ed. 1244 (1931). We have stressed that "[t]he doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts . . ."; *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299, 37 S.Ct. 506, 507, 61 L.Ed. 1148 (1917).

Id. at 401. The Court emphasized the responsibility of the litigant and the importance of his choice:

> The language used by this Court half a century ago is even more compelling in view of today's crowded

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his malicious prosecution theory (in the sanctions proceedings or by complaint) prior to the August 7, 1987 Rule 11 order (40a). The sanctions were imposed more than a month after the sanctions hearing was set and noticed.

[9] Petitioners submit that the relative ease of the negligence standard employed in Rule 11 analysis, the summary nature of the proceedings and counsel's arguments to the District Court, quoted *supra,* make this conclusion obvious.

> docket's. "The predicament in which respondent finds himself is of his own making . . . [W]e cannot be expected, for his sole relief, to upset the general and well-established doctrine of *res judicata*, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy and the mischief that would follow the establishment of precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship."

Id. at 401-402, quoting *Reed v. Allen*, 286 U.S. at 198-199, 52 S.Ct. at 533.

Petitioners urge the Court that Respondent chose his forum and decided to address the alleged wrong against him by way of a Rule 11 sanctions proceeding. He was given a full and fair opportunity to present the substance of his claim. He should not be permitted another. To allow such a "second bite at the apple" would run contrary to long-established legal doctrine and the very spirit and purpose of Rule 11, as stated by the Advisory Committee on Rules (127a-132a).

II. TECHNICAL DIFFERENCES IN THE "NATURE," ELEMENTS, AVAILABLE RELIEF, LEGAL STANDARDS, OR UNDERLYING PURPOSE OF MALICIOUS PROSECUTION ACTIONS AND RULE 11 SANCTIONS ARE IRRELEVANT TO RES JUDICATA ANALYSIS.

Respondent argued below, and the Eighth Circuit erroneously ruled, that Cohen's Rule 11 claims were not identical with those he asserts in his malicious prosecution action because the nature, timing, relief available, elements and legal standards were not identical. In so ruling, the Eighth Circuit ignored its own definition of a "claim" or "cause of action," reiterated in *Lane, supra*, and embraced by most every Circuit and the American

Law Institute. The "transactional" approach does not afford any weight whatsoever to these arguments. Plainly put, the Restatement's view is that if two actions flow from the same "transaction" or "series of transactions" or events, then they are the same claim for res judicata purposes:

> The Restatement (Second)'s "transactional" approach to res judicata contemplates that there may be some variance in the proof required for claims that are nonetheless the "same claim" for res judicata purposes. *The operative question in each case is whether the claims arise out of the same nucleus of facts.* As stated in the Restatement (Second) of Judgments,
>
> > [t]he present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. *The transaction is the basis of the litigative unit or entity which may not be split.*
>
> Restatement (Second of Judgments § 24, comment *a* at 197 (1980). (Footnote omitted).
>
> Similarly, . . . reliance in this suit on different substantive law and new legal theories does not preclude the operation of res judicata. *One of the merits of the Restatement (Second)'s approach is that it prevents parties from suing on a claim that is in essence the same as a previously litigated claim but is dressed up to look different.* Thus, where a plaintiff fashions a new theory of recovery or cites a new body of law that was arguably violated by a defendant's conduct, res judicata will still bar the second claim if it is based on the same nucleus of operative facts as the

> prior claim. [Citations omitted]. See also Restatement (Second) of Judgments § 24 comments a, b, & c (1981).

Lane, supra at 743-744. (Emphasis added.)

Petitioners urge that this language from the Eighth Circuit itself exposes its flawed reasoning in this case. It is clear that Mr. Cohen's malicious prosecution claim is nothing more than his Rule 11 claim restated, and "dressed up to look different."

In *Ruple v. City of Vermillion, South Dakota*, 714 F.2d 860, 861 (8th Cir. 1983), Judge Arnold got to the point at hand:

> Res judicata, of course, applies only if the second action is on the same "cause of action" as the first, and that is the principal issue raised by this appeal. At common law, the term "cause of action" was given a rather rigid and technical construction. That is, if someone brought debt to recover possession of a specific thing, and the action was dismissed, a second action, this time in the form of detinue would not be barred. The second case, it was said, was on a different "cause of action." The concept, though technical, had at least the virtue of clarity. More recently, the phrase "cause of action" or "claim", now favored by most courts, has been given a more practical construction. It is now said, in general, that *if a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate as a former action, that the two cases are really the same "claim" or "cause of action" for purposes of res judicata.* Since the forms of action have been abolished, and joinder of claims and amendment of pleadings are liberally permitted in both Federal and State Courts, *there is no reason to give a claimant more than one fair chance to present the substance of his or her case.*

Id. at 861. (Emphasis added.) Petitioners submit that this sound reasoning compels the reversal of the Eighth

Circuit's ill-reasoned opinion in this case. Irving Cohen has had his one fair chance to present the substance of his claim. He won, but he should not be given successive chances to improve his recovery.

Petitioners submit that the technical differences between prosecution of a Rule 11 claim and a civil action are irrelevant; that the only analysis that makes a difference is whether the two claims arise from the same nucleous of operative facts. Respondent's arguments fail in view of the transactional approach and the reasoning of *Nevada v. U.S.*, *Federated Department Stores, Inc. v. Moitie*, *Lane* and *Ruple*, *supra*, and the lines of cases cited therein.

III. THE RULES ENABLING ACT IS IRRELEVANT TO THE QUESTIONS PRESENTED HEREIN.

The so-called "Rules Enabling Act," 28 U.S.C., Sections 2071-2072, authorizes the Court to promulgate general rules of practice and procedure and rules of evidence for cases in the district courts and courts of appeal. The Court has no authority to enact rules that "abridge, enlarge or modify any substantive right." *Id.* This Court promulgated Rule 11 and the rest of the Federal Rules of Civil Procedure to "govern the procedure in the United States district courts in all suits of a civil nature." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13, 61 S.Ct. 422, 426, 85 L.Ed. 479 (1941). A rule of civil procedure has the force of a federal statute. *Id.*

Clearly Rule 11 would violate the Rules Enabling Act if it were allowed as an independent basis for parties without any other jurisdictional grant to get into federal court. *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444-446, 66 S.Ct. 242, 245-246, 90 LEd. 185 (1946). Also see *Port Drum v. Umphrey*, 852 F.2d 148, 149 (5th Cir. 1988). This was the issue decided in the *Port Drum* case, as cited properly by the Eighth Circuit (4a). *Id.* But that is not the issue here.

It cannot be denied that Rule 11 grants to those already justly before the district courts a "right" to ask for and receive monetary recompense for the "wrongs" of another party or attorney. To the extent that this is held to "expand" substantive rights, the Rule could be considered violative of the Rules Enabling Act. But this Court addressed this issue recently, concluding that the Rule and the Act were compatible in *Business Guides*, *supra*, 111 S. Ct. at 933-934.

Petitioners urge that Rule 11 grants only a procedural right intended to regulate practices in the district courts. However, the "substantive-procedural" distinction, which is crucial to the survival of Rule 11, is totally irrelevant to res judicata analysis. Rule 11 neither expands nor abridges any substantive right Mr. Cohen may have had to substantive relief in the State or Federal courts. Yet, his Rule 11 claim is nevertheless a "claim" (albeit on a procedural basis) arising from the same nucleus of operative facts as his civil malicious prosecution claim. This is not because of Rule 11, but because Mr. Cohen framed his Rule 11 application so broadly and failed to raise it earlier. *Therefore, it is Respondent's conduct,* not Rule 11, *which has "abridged" his substantive right.*

This is nothing new. Procedural rules have always affected substantive rights, as with dismissals, summary judgments, and judgments on the pleadings. All of these are capable of producing a final judgment on the merits of substantive claims. All of these occasion judgments protected from a relitigation by res judicata. Thus it is clear that the Rules Enabling Act cannot act as a bar to the application of res judicata to a Rule 11 judgment. The application of res judicata does not hinge on whether Rule 11 rights are characterized as substantive or procedural—all that matters is whether the two claims arose from the same factual predicate—the same "nucleus of operative facts." The common law principle of res judicata protects all parties from being subjected to the re-

litigation of claims previously adjudicated, whether those claims originate in substantive law or procedural rules.

IV. COHEN FAILED TO PRESENT HIS MALICIOUS PROSECUTION THEORY TO THE DISTRICT COURT BEFORE THE COURT RULED ON HIS RULE 11 APPLICATION.

As previously stated, Mr. Cohen had plenty of time to bring his malicious prosecution action prior to resolution of his Rule 11 motion. When the application was filed, Mr. Cohen expressly suggested that the District Court reserve its ruling on sanctions until the appeal of the underlying action was concluded (61a). The District Court complied and delayed hearing on the matter until July, 1987—after the Eighth Circuit had affirmed the initial *Bastien* summary judgment fifteen months after the Rule 11 application had been filed. Finally, on August 7, 1987—the District Court ruled (40a).

Mr. Cohen could have presented his malicious prosecution theory before the District Court prior to the Rule 11 ruling, either in his Joint Application For Fees and Costs or by original complaint and consolidation under local rule. This is required under the preferred view of the Restatement (Second) of Judgments. *Restatement (Second) of Judgments*, § 25 and comments thereto (1982) (124a).

The Restatement (Second) places the burden on the plaintiff to present all of his alternative theories in the first instance so that the court will have the opportunity to decide whether to consider them. "[I]n cases of doubt, it is appropriate . . . to compel plaintiff to bring forward his state theories in the federal action, in order to make it possible to resolve the entire controversy in a single lawsuit." *Restatement (Second) of Judgments*, § 25, reporter's note at p. 228 (1982). The record reveals that Mr. Cohen failed to do so, even when he clearly had the opportunity. Rather, he sat back and waited to see how

he did with the Rule 11 proceedings before filing his malicious prosecution action. This strategy runs squarely into conflict with res judicata.

Mr. Cohen also argued that this Court's consideration of a Petition for Writ of Certiorari on the *Bastien* matter prevented the "termination" of the *Bastien* action in his favor. This, too, is not so. *See Glick v. Ballentine Produce, Inc.*, 397 F.2d 590, 594 (8th Cir. 1968) (the mere filing of a certiorari petition does not stay the finality of the Eighth Circuit's mandate and does not toll the running of Missouri's statute of limitations). We have not found a single authority in Missouri or elsewhere that suggests that the "termination" of an action for malicious prosecution purposes is delayed pending the Supreme Court's decision on whether to grant or deny a pending Petition for a Writ of Certiorari.

Thus, Cohen could have, and should have presented his malicious prosecution theory to the District Court *before* the Rule 11 decision. The District Court would have had jurisdiction to consider the theory under 28 U.S.C. § 1332 (diversity jurisdiction) or under the pendent jurisdiction of the federal courts. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

Res judicata now bars the malicious prosecution suit because Cohen could have presented his theory to the District Court *before* it imposed the sanctions on August 7, 1987 (40a). *Cromwell v. County of Sac*, 4 Otto 351, 94 U.S. 351, 352, 24 L.Ed. 195 (1876). The Rule 11 order, delayed for fifteen months pending appellate review of the underlying action, put an end to Cohen's claim "which cannot again be brought into litigation between the parties upon any ground whatever." *Commissioner v. Sunnen*, 333 U.S. 591, 597, 68 S.Ct. 317, 319-320, 84 L.Ed. 329 (1948).

CONCLUSION

Respondent Irving Cohen has brought a lawsuit alleging malicious prosecution against Petitioners which is exactly the same claim—albeit "dressed up to look different"—he litigated previously in his Rule 11 proceedings. The transactional approach to res judicata does not allow for such relitigation. Technical differences between Rule 11 proceedings and a malicious prosecution case are only the difference between two theories Mr. Cohen sought to employ, much the same as he might bring a suit on alternative theories in different counts of a complaint. They do not serve to rescue Mr. Cohen's instant claim from preclusion by res judicata.

Mr. Cohen had one full and fair chance to litigate the substance of his claim. He could have brought his malicious prosecution claim before the District Court before the Rule 11 sanctions were ordered, but chose to hold back. Perhaps the District Court would have acted differently in the exercise of its broad discretion under Rule 11 had it known at the time that Mr. Cohen intended to pursue a malicious prosecution action.

Once the Rule 11 order was affirmed, Mr. Cohen promptly filed his malicious prosecution action, subjecting Petitioners a second time to the identical claim, arising from identical facts—the conduct of the entire *Bastien* securities fraud case. Apparently disappointed with the amount of the sanctions, Mr. Cohen was back in court a second time, seeking more. But the law will not allow it.

For the foregoing reasons, Petitioners urge this Court to issue a Writ of Certiorari to the U.S. Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1422

IRVING COHEN,

Appellant,

v.

DAVID G. LUPO; JAMES A. STEMMLER; LUPO & STEMMLER; JACK D. BASTIEN; ARTHUR F. O'HARE; JANE S. TSCHUDY; THOMAS W. YAGER; RONALD B. BURT; ARLA E. REED; MICHAEL J. KICKHAM; E. LOUIS WERNER, JR.,

Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: October 8, 1990

Filed: February 28, 1991

Before BOWMAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, WOLLMAN, Circuit Judge.

WOLLMAN, Circuit Judge.

Irving Cohen appeals the district court's dismissal of Cohen's malicious prosecution complaint on the basis of res judicata. We reverse.

I.

Eight clients of the law firm Lupo & Stemmler (collectively, Lupo & Stemmler) unsuccessfully sued Cohen and more than thirty other defendants on unmeritorious allegations of securities fraud in *Bastien v. R. Rowland & Co.*, 631 F. Supp. 1554 (E.D. Mo. 1986) (*Bastien I*), *aff'd*, 815 F.2d 713 (8th Cir. 1987), *cert. denied*, 484 U.S. 854 (1987). Lupo & Stemmler's complaint against Cohen arose out of tax shelter investments in motion pictures that proved unprofitable. After four years of discovery, no probative evidence supported Lupo & Stemmler's allegations. The district court granted summary judgment in favor of Cohen. Cohen then moved for sanctions against Lupo & Stemmler under Federal Rule of Civil Procedure II.

In its Rule 11 decision, the court found that the *Bastien I* litigation had been conducted "in a manner that escalated costs unnecessarily and vexatiously." *Bastien v. R. Rowland & Co.*, 116 F.R.D. 619, 621 (E.D. Mo. 1987) (*Bastien II*), *aff'd sub nom. Lupo v. R. Rowland & Co.*, 857 F.2d 482 (8th Cir. 1988), *cert. denied*, 490 U.S. 1081 (1989). Thus, the court awarded $100,000 under Rule 11 as a sanction against Lupo & Stemmler's bad faith conduct, $50,000 of which was assessed against the attorneys and $50,000 against the eight plaintiffs.

Following the decision in *Bastien II*, Cohen filed this suit based upon the common law tort of malicious prosecution to recoup the extensive fees and costs of nearly one mililon dollars incurred in defending the *Bastien* litigation. The district court dismissed the complaint on the ground that imposition of Rule II sanctions against Lupo & Stemmler in *Bastien II* barred Cohen's malicious prosecution claim on res judicata principles.

II

Res judicata precludes relitigation of the same claim in a subsequent proceeding. For the doctrine to apply, the prior judgment must be rendered by a court of competent jurisdiction, it must be a final judgment on the merits, and both cases must have involved the same cause of action and the same parties. *Headley v. Bacon*, 828 F.2d 1272, 1274 (8th Cir. 1987). Res judicata bars claims which were actually litigated or could properly have been raised and determined in the prior proceeding. *Poe v. John Deere Co.*, 695 F.2d 1103, 1105 (8th Cir. 1982).

We conclude that *Bastien II* does not have res judicata effect in this case because Cohen's malicious prosecution cause of action does not raise the same claim that *Bastien II* resolved. Cohen's malicious prosecution claim was not actually litigated and could not properly been raised and determined in *Bastien II*. Moreover, Rule 11 and the tort of malicious prosecution differ in their nature, the elements of the claims, and the potential remedies.

The district court did not decide whether the *Bastien I* complaint was filed without probable cause, whether Lupo & Stemmler acted with malice, or the amount of damages Cohen suffered as a result of Lupo & Stemmler's misconduct. Those inquiries are irrelevant under Rule 11, but are the sum and substance of the tort of malicious prosecution. The nucleus of operative fact necessary to maintain an action for malicious prosecution includes the conclusion of the underlying action. Whether Cohen would be victorious in the *Bastien* litigation could not have been determined until the conclusion of that case.

Federal Rule of Civil Procedure 11 grants a court discretion to discipline parties and counsel for conducting litigation in bad faith or in a frivolous and abusive fashion. Rule 11 is a procedural tool that under the Rules Enabling Act can not "abridge, enlarge or modify

any substantive right." 28 U.S.C. § 2072. Rule 11 sanctions must be sought by motion in a pending case; there can be no independent cause of action instituted for Rule 11 sanctions. *Port Drum Co. v. Umphrey*, 852 F.2d 148, 151 (5th Cir. 1988).

On the other hand, the common law tort of malicious prosecution is a claim in its own right under applicable state law. In Missouri, malicious prosecution requires proof that: (1) the underlying offending lawsuit was initiated or maintained without probable cause; (2) the plaintiff in the initial suit acted with malice; (3) the proceeding terminated in favor of the defendant; and (4) the defendant suffered damages as a result of the suit. *Stafford v. Muster*, 582 S.W.2d 670, 675 (Mo. 1979). Rule 11 can not abridge the substantive state law of malicious prosecution, nor was it adopted to serve as a surrogate for an action based upon a claim of malicious prosecution resulting from frivolous harassing, or vexatious litigation.

The district court recognized that the $100,000 award under Rule 11 represented merely "a fraction of the fees and costs incurred by [Cohen]." Lupo & Stemmler subjected Cohen to years of vexatious litigation and induced costs far exceeding that of the original investment. Cohen should have the chance to prove that *Bastien I* was conducted in such bad faith that it constituted malicious prosecution and, if successful in so proving, be compensated for his loss.

The district court's order dismissing Cohen's complaint is reversed, and the case is remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 88-2018C (A)

IRVING COHEN,

Plaintiff,

v.

DAVID G. LUPO, *et al.*,

Defendants.

MEMORANDUM AND ORDER

[Filed July 7, 1989]

This matter is before the Court on the separate motions of defendants for judgment on the pleadings or for dismissal.

The background of this case may be stated as follows: On October 18, 1988, plaintiff filed a two-count complaint alleging damages resulting from defendants' malicious prosecution of the original action, *Bastian, et al. v. R. Rowland & Co., et al.*, (No. 82-9506(6)) (hereinafter *Bastian* case). Count I alleges that defendants (*Bastian* plaintiffs) wrongfully initiated the *Bastian* case, and Count II alleges wrongful maintenance and conduct of the *Bastian* case.

On March 31, 1986, Judge Gunn of this court sustained the *Bastian* defendant's (plaintiff herein being a co-defendant) motion for summary judgment in the *Bastian* case. Subsequently, on May 7, 1986, the *Bastian* defendants filed a "Joint Application for Attorneys' Fees and Expenses" pursuant to Fed. R. Civ. P. 11, 28 U.S.C.

§ 1927, and upon common law principles governing good faith and fairness in the institution and conduct of the *Bastian* case. Each defendant in the *Bastian* case sought to recover from the plaintiffs and their counsel, attorneys' fees and expenses incurred in the defense of the case.

On August 7, 1987, Judge Gunn entered a several judgment in favor of the defendants in the *Bastian* case for $100,000.00 to be paid by plaintiffs in the *Bastian* case in the following manner: *Bastian* plaintiffs' attorneys, the partnership of Lupo and Stemmler, $50,000.00; *Bastian* plaintiff Werner, $25,000.00; the remaining $25,000.00 divided among the remaining *Bastian* co-plaintiffs, Kickham, Bastian, Reed, Burt, Yager, O'Hare and Tschudy. Judge Gunn sanctioned the *Bastian* plaintiffs and their counsel for their bad faith conduct, stating "'* * * conduct of the litigation * * * was frivolous and abusive and not directed toward the 'just, speedy and inexpensive determination of [the] action,'" *citing* Fed. R. Civ. P. 1. The *Bastian* plaintiffs appealed the sanction order to the Eight Circuit Court of Appeals, which affirmed the trial court decision, *cited* at 857 F.2d 482 (8th Cir. 1988). The *Bastian* plaintiffs further appealed to the United States Supreme Court, which denied certiorari on May 22, 1989. 57 U.S.L.W. 3766 (U.S. May 23, 1989) (No. 88-1605).

Plaintiff, a citizen of Florida, brought the instant action for malicious prosecution, seeking $500,000.00 in compensatory damages, claiming $219,000.00 in attorneys' fees and $34,000.00 in costs incurred in the defense of the *Bastian* case, as well as $1,000,000.00 punitive damages, plus interest, costs and attorneys' fees. Plaintiff's cause of action is premised upon the alleged wrongful and improper initiation, maintenance and conduct of the *Bastian* case by the defendants, all citizens of Missouri, with exception to Illinois Citizen Bastian. Parties assert this Court has jurisdiction over the action pursuant to 28 U.S.C. § 1332.

Subsequent to the close of pleadings, defendants Tschudy, Reed, Kickham, Burt, Stemmler, Yager and Werner separately moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). In addition, defendants O'Hare, the partnership of Lupo and Stemmler, Bastian, Tschudy, Kickham and Stemmler, separately moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), (Defendants Tschudy, pursuant to Fed. R. Civ. P. 56(c), Kickham and Stemmler so moving in the alternative). Defendants argue in support of their motions that plaintiff's action is barred by the doctrines of *res judicata, collateral estoppel* and/or election of remedies. Further, defendant Lupo and Stemmler, the partnership, moves to dismiss for plaintiff's failure to state a cause of action upon which relief may be granted.

In this Circuit, motions to dismiss filed after the close of pleadings are viewed as motions for judgment on the pleadings. *See* Fed. R. Civ. P. 12(c), *St. Paul Ramsey County Medical Center v. Pennington County, SD*, 857 F.2d 1185, 1187 (8th Cir. 1988). A defense of a failure to state a claim may be raised in such a motion, *see* Fed. R. Civ. P. 12(h), and the standard to be employed is the same as if the motion had been brought under Rule 12(b)(6). *See Pennington County, SD*, 857 F.2d at 1187; 5 C. Wright and A. Miller, *Federal Practice and Procedure*, § 1368 (1969). Therefore, this Court will examine the motions of judgment on the pleadings of defendants Reed, Burt, Yager and Werner under the same standard as the motions of defendants O'Hare and the partnership of Lupo and Stemmler to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). In so doing, the Court will judge all motions (with exception of defendant Tschudy's motion for summary judgment) on the same standard without reference to any matters outside the pleadings pursuant to Fed. R. Civ. P. 12(b).

A complaint should not be dismissed for failure to state a claim "unless it appears beyond a doubt that the

plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Court must accept the allegations contained in the complaint as true, *see Pennington County, SD, supra*, at 1188, *citing Ad-Hoc Committee v. Bernard M. Baruch College*, 835 F.2d 980, 982 (2nd Cir. 1987), and should not dismiss it merely because the court doubts that a plaintiff will be able to prove all necessary factual allegations. *Bennett v. Berg*, 685 F.2d 1053, 1058 (8th Cir. 1982), *cert. denied*, 464 U.S. 1008 (1983). "Thus, as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982).

In this diversity case, it is undisputed that Missouri law applies. Missouri law does not favor suits in malicious prosecution and are to be carefully guarded against. *Zahorsky v. Griffin*, 690 S.W.2d 144, 151 (Mo. App.1985). Under Missouri law, "* * * to maintain a cause of action in malicious prosecution, a plaintiff has the burden of proving that the defendant instituted the original judicial proceeding without probable cause and with malice, the proceeding terminated in plaintiff's favor, and the plaintiff was damaged." *Id.* at 147. The damage complained of by the plaintiff in the case at bar is, generally, attorney fees, costs related to the *Bastian* case, and punitive damages.

This Court is of the opinion that defendants' motions for judgment on the pleadings or to dismiss should be granted for reasons expressed below.

Missouri courts recognized and apply the "traditional" *res judicata* which prohibits a party from asserting, in a second action, any claim arising from the same *transaction* which gave rise to a claim previously adjudicated on the merits. *Brown v. St. Louis Police Department*,

Etc., 691 F.2d 393, 395 (8th Cir. 1982), cert. denied, 461 U.S. 908 (1983). The presence of additional parties in the earlier suit is an immaterial factor for "traditional" *res judicata* purposes, so long as the other requirements of the doctrine are met. *Roach v. Teamsters Local Union No. 608*, 455 F.Supp. 322, 324 (E.D.Mo. 1978), aff'd 595 F.2d 446 (8th Cir. 1979); *see generally*, RESTATEMENT (SECOND) OF JUDGMENTS, §§ 19, 34 (1982). The doctrine of "traditional" *res judicata*, expressed both in the rule against "splitting" a cause of action, *see Burke v. Doerflinger*, 633 S.W.2d 405, 407 (Mo.App.1983); *see generally* RESTATEMENT—JUDGMENTS, *supra* § 24, Comment a, § 25, and in the abbreviated formula which applies the bar of *res judicata* to claims which "could" have been litigated in the first action, *see e.g., Allen v. McCurry*, 449 U.S. 90, 94 (1920), is based upon the concept that a "cause of action" is more than a mere theory of recovery, per se, rather it is a composite of all rights flowing from the transaction, or series of transactions, which gave rise to the claim earlier adjudicated. See RESTATEMENT—JUDGMENTS, *supra.* This "transactional" concept of a "cause of action" has long been embraced by the Missouri courts with respect to the application of *res judicata. See Grue v. Hensley*, 210 S.W.2d 7, 10 (Mo. 1948). As previously stated, plaintiff sought and was awarded a portion of attorneys fees and related expenses incurred in the defense of the *Bastian* case pursuant to the "Joint Application for Attorneys' Fees and Expenses", (hereinafter referred to as "Joint Application"), premised on Fed. R. Civ. P. 11, 28 U.S.C. § 1927, and common law "good faith".[1]

The Court is of the opinion that plaintiff's current malicious prosecution action seeking further recovery of

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[1] Such action is viewed by this Court to be a "claim" for purposes of res judicata, since the "Joint Application" was premised upon a procedural device, federal law and on common law principles.

attorneys' fees and related expenses and damages incurred in the defense of the *Bastian* case, is a theory of recovery embraced by the transaction that gave rise to plaintiff's "Joint Application" claim. *See, e.g. Allen v. McCurry*, 449 U.S. 90, 94 (1920); *Burke v. Doeflinger*, 663 S.W.2d at 407; *see generally*, RESTATEMENT—JUDGMENTS, *supra*, § 24, Comment c.

Therefore, it is the opinion of this Court that even taking plaintiff's allegations as true, the doctrine of *res judicata* bars plaintiff's claim for attorneys' fees and related expenses and damages incurred in the defense of the *Bastian* case, due to the ruling of Judge Gunn on August 7, 1987, granting plaintiff recovery. *Bastian, et al. v. R. Rowland & Co., et al.*, 116 F.R.D. 619 (E.D.Mo. 1987), *aff'd*, 857 F.2d 482 (8th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3766 (U.S. May 22, 1989) (No. 88-1605).

Accordingly, the separate motions of defendants Tschudy, Reed, Kickham, Burt, Stemmler, Yager and Werner for judgment on the pleadings are GRANTED.

Further, the separate motions to dismiss of defendants Lupo, O'Hare, Bastian, and the partnership of Lupo and Stemmler, are GRANTED.

The separate motions in the alternative to dismiss of defendants Tschudy, Kickham, Stemmler and the partnership of Lupo and Stemmler, are moot since the Court has previously granted the said defendants' separate motions for judgment on the pleadings or for dismissal.

/s/ [Illegible]
U.S. District Judge

July 7, 1989

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1422EM

IRVING COHEN,

Appellant,

vs.

DAVID G. LUPO, *et al.*,

Appellees.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

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Appellees' O'Hare, Tschudy, Yager, Burt, Reed, Kirkham & Werner and appellees' David Lupo and James Stemmer suggestions for rehearing en banc have been considered by the court and are denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petitions for rehearing by the panel are also denied.

April 16, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Gaus

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 88-2018-C-A

IRVING COHEN,

Plaintiff,

vs.

DAVID G. LUPO, *et al.*,

Defendants.

DEFENDANT'S LUPO AND LUPO & STEMMLER'S SEPARATE MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Come now Defendants David G. Lupo and Lupo & Stemmler, by and through their counsel of record, and move this Court for its Order dismissing Plaintiff's cause of action for malicious prosecution at Plaintiff's costs, pursuant to the Federal Rules of Civil Procedure and the doctrine of election of remedies. In support of their said Motion, said Defendants state to the Court as follows:

1. That the facts and issues raised by Plaintiff's instant Complaint are identical to the facts and issues previously litigated in this Court in Rule 11 proceedings brought by Plaintiff as a Defendant in the case of *Jack D. Bastien, et al. v. R. Rowland & Co., Inc., et al.*, Cause No. 82-950(C).

2. That Defendants David G. Lupo and Lupo & Stemmler have suffered a detriment and/or change of situation resulting from the imposition of sanctions by

this Court pursuant to the aforesaid Rule 11 proceedings such that the remedy of Rule 11 sanctions is inconsistent with the remedy of a civil cause of action for malicious prosecution asserted herein. *See Abdallah v. Abdallah*, 359 F.2d 170, 175 (3d Cir. 1966).

3. That at the time Plaintiff chose to pursue Rule 11 sanctions against these Defendants, the aforesaid cause of action for civil malicious prosecution was available to Plaintiff, but he elected instead to pursue, and to continue to pursue, the remedy of Rule 11 sanctions.

4. That, therefore, Plaintiff made his election of remedies, and he has been awarded Rule 11 sanctions, and has therefore prejudiced these Defendants such that he should not now be allowed to pursue a different and inconsistent remedy against these Defendants. *Abdallah, supra.*

WHEREFORE, Defendants David G. Lupo and Lupo & Stemmler, by and through their counsel of record, pray this Court for its Order dismising with prejudice Plaintiff's cause of action for failure to state a claim upon relief can be granted, together with such other and further orders as the Court deems just and proper under the premises.

EBERT, MENEES & KRIEGEL

By: /s/ Hardy C. Menees
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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

Civil Action No. 88-2018-C-A

IRVING COHEN, a citizen of Florida
1800 N.E. 114th Street
N. Miami, FL 33181,

Plaintiff,

v.

DAVID G. LUPO, a citizen of Missouri
1524 Breeze Ridge
St. Louis, MO 63131

JAMES A. STEMMLER, a citizen of Missouri
224 College Avenue
St. Louis, MO 63119

LUPO & STEMMLER, a Missouri partnership
Suite 1240
Paul Brown Building
8818 Olive Street
St. Louis, MO 63101

JACK D. BASTIEN, a citizen of Illinois
53 Harrison Street
Vergennes, IL 62994

ARTHUR F. O'HARE, a citizen of Missouri
891 Clubhouse Drive
Ballwin, MO 63011

JANE S. TSCHUDY, a citizen of Missouri
No. 9 Country Estates
Frontenac, MO 63131

THOMAS W. YAGER, a citizen of Missouri
28 Clermont Lane
St. Louis, MO 63124

RONALD B. BURT, a citizen of Missouri
4155 Nara Drive
Florissant, MO 63033

ARLA E. REED, a citizen of Missouri
1255 Diane
Union, MO 63077

MICHAEL J. KICKHAM, a citizen of Missouri
365 Conway Garden Court
Creve Coeur, MO 63141

E. LOUIS WERNER, JR., a citizen of Arizona
5715 N. Camildell
Paradise Valley, AZ 85253,
Defendants.

JURY TRIAL DEMANDED

COMPLAINT

(Malicious Prosecution)

Plaintiff, Irving Cohen, by his undersigned counsel, alleges as follows:

1. This is an action for malicious prosecution. Plaintiff seeks to recover compensatory and punitive damages from defendants, who instituted, conducted, and maintained a civil action against plaintiff maliciously and without probable cause.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332(a)(1). Jurisdiction is grounded on diversity of citizenship between the plaintiff and each defendant; the amount in controversy ex-

ceeds $10,000, exclusive of interest and costs. Venue lies in this Court pursuant to 28 U.S.C. § 1381(a); the acts complained of occured in the Eastern District of Missouri.

PARTIES

A. *The Plaintiff*

3. Irving Cohen is a citizen of the State of Florida.

B. *The Defendants*

4. Upon information and belief, David G. Lupo, Esquire, is a citizen of the State of Missouri.

5. Upon information and belief, James A. Stemmler, Esquire, is a citizen of the State of Missouri.

6. Upon information and belief, Lupo & Stemmler is a law partnership duly organized and existing under the laws of the State of Missouri.

7. Upon information and belief, Jack D. Bastien is a citizen of the State of Illinois.

8. Upon information and belief, Arthur F. O'Hare is a citizen of the State of Missouri.

9. Upon information and belief, Jane S. Tschudy is a citizen of the State of Missouri.

10. Upon information and belief, Thomas W. Yager is a citizen of the State of Missouri.

11. Upon information and belief, Ronald B. Burt is a citizen of the State of Missouri.

12. Upon information and belief, Arla E. Reed is a citizen of the State of Missouri.

13. Upon information and belief, Michael J. Kickham is a citizen of the State of Missouri.

14. Upon information and belief, E. Louis Werner, Jr., is a citizen of the State of Arizona.

THE FACTS

A. *The Previous Litigation*

15. An action captioned *Jack D. Bastien, et al. v. R. Rowland & Co., Inc., et al.*, No. 82-950-C was filed in this Court in June 1982 (hereafter referred to as "*Bastien*").

16. The plaintiffs in *Bastien* were eight of the defendants in this case: Jack D. Bastien, Arthur F. O'Hare, Jane S. Tschudy, Thomas W. Yager, Ronald B. Burt, Arla E. Reed, Michael J. Kickham, and E. Louis Werner, Jr. (hereafter, "the *Bastien* plaintiffs"). The attorneys of record for the *Bastien* plaintiffs were defendants David G. Lupo, Esquire, and James A. Stemmler, Esquire, both of whom were and, on information and belief, are partners in the law firm of Lupo & Stemmler, also a defendant in this case.

17. The *Bastien* defendants included the plaintiff in this action, Irving Cohen.

18. The *Bastien* plaintiffs invested, during 1975 and 1976, in five limited partnerships formed to acquire and commercially exploit motion pictures.

19. Irving Cohen was the general partner of two of the five limited partnerships challenged in *Bastien*.

20. At the time of their investments, the *Bastien* plaintiffe were sophisticated investors, each of whom represented in writing that s/he had read and understood the Offer Memorandum which had been prepared for each Limited Partnership. These Offering Memoranda described the investments in detail and highlighted the "high risk" associated with investing in each of the limited partnerships.

21. Despite the facts alleged in Paragraph 20, Defendants initiated the *Bastien* litigation and alleged that the challenged investments had been misrepresented to them. The *Bastien* Complaint, as amended (hereafter,

"Complaint"), contained thirteen counts, alleging violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 USC §§ 1962 and 1964(c), and Missouri common law.

22. On March 4, 1986, the *Bastien* defendants, including Cohen, filed motions for summary judgment supported by affidavits, documentary evidence and deposition testimony. The *Bastien* plaintiffs filed memoranda opposing the summary judgment motions and presented over three days of in-court testimony in an attempt to create a factual dispute about any material issue raised by the pleadings.

23. The *Bastien* plaintiffs failed to demonstrate the existence of a single material disputed fact, and Judge George F. Gunn of this Court so found. On March 31, 1986 Judge Gunn orally sustained Irving Cohen's and the other *Bastien* defendants' motions for summary judgment. The basis of that ruling was explained in a written opinion and order dated April 17, 1986.

24. On April 28, 1986, the *Bastien* plaintiffs noticed an appeal from the district court judgment to the United States Court of Appeals for the Eighth Circuit. On March 25, 1987, the Eighth Circuit affirmed in an unpublished opinion. (*Jack D. Bastien, et al. v. R. Rowland & Co., et al.*, Eighth Cir., No. 86-1519.)

25. On June 9, 1987, the *Bastien* plaintiffs filed with the United States Supreme Court an Application for Stay of Enforcement of the Mandate of the United States Court of Appeals for the Eighth Circuit. The following day, Justice Harry A. Blackmun denied the Application.

26. On August 6, 1987, the *Bastien* plaintiffs filed a Petition for a Writ of Certiorari with the United States Supreme Court. The Petition was denied on October 5, 1987.

27. On May 7, 1986, the *Bastien* defendants, including Irving Cohen, moved for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure against the defendants in this case—*i.e.*, the *Bastien* plaintiffs and their attorneys—for the abusive and frivolous manner in which the *Bastien* litigation had been conducted.

28. On August 7, 1987, Judge Gunn imposed Rule 11 sanctions against the *Bastien* plaintiffs and their attorneys, Lupo & Stemmler. The Court specifically found that the defendants' conduct of the litigation was "frivolous and abusive."

29. On September 20, 1988, the Eighth Circuit affirmed Judge Gunn's imposition of sanctions. (*David G. Lupo, et al. v. R. Rowland & Co., et al.*, Eighth Cir., No. 87-2296.)

B. *The Lack of Probable Cause and Defendants' Malice in Initiating and Maintaining the Bastien Litigation*

30. The defendants in this action, each of whom participated in the *Bastien* litigation as either plaintiff or plaintiffs' attorney, knew of no facts at the time the Complaint was filed and amended to support any Count in the *Bastien* Complaint.

31. Jack D. Bastien testified during discovery in *Bastien* that he knew of no facts to support any allegation in the *Bastien* Complaint.

32. Arthur F. O'Hare testified during discovery in *Bastien* that he knew of no facts to support any allegation in the *Bastien* Complaint.

33. Jane S. Tschudy testified during discovery in *Bastien* that she knew of no facts to support any allegation in the *Bastien* Complaint.

34. Thomas W. Yager testified during discovery in *Bastien* that he knew of no facts to support any allegation in the *Bastien* Complaint.

35. Ronald B. Hurt testified during discovery in *Bastien* that he knew of no facts to support any allegation in the *Bastien* Complaint.

36. Arla E. Reed testified during discovery in *Bastien* that he knew of no facts to support any allegation in the *Bastien* Complaint.

37. Michael J. Kickham testified during discovery that he knew of no facts to support any allegation in the *Bastien* Complaint.

38. E. Louis Werner, Jr. testified during discovery in *Bastien* that he knew of no facts to support any allegation in the *Bastien* Complaint.

39. During the three and one-half days of hearings before Judge Gunn, not one of the *Bastien* plaintiffs testified in opposition to the *Bastien* defendants' summary judgment motions.

40. No affidavit by a *Bastien* plaintiff was submitted to the Court in opposition to the *Bastien* summary judgment motions.

41. Since the *Bastien* plaintiffs knew of no facts to support any allegation in the Complaint, the attorney/defendants could not have relied and did not rely on any facts from their clients, the *Bastien* plaintiffs, to support any of the allegations that they pleaded in the *Bastien Complaint*, either as initially filed or as amended.

42. Defendants David G. Lupo, James A. Stemmler, and Lupo & Stemmler knew of no facts—from the *Bastien* plaintiffs or from any other source—to support any of the allegations in the *Bastien* Complaint. These defendants submitted only one substantive affidavit to the District Court during the course of the *Bastien* litigation. That affidavit did not concern the facts at issue in *Bastien* or any of the challenged partnerships which had been organized by Irving Cohen.

43. Defendants' lack of factual support for the claims made in *Bastien* led them to unduly extend and proliferate pretrial discovery in *Bastien*. Those vexatious and unreasonable delay tactics led this Court to impose sanctions on them in December 1985 and again in March 1986.

44. In granting the *Bastien* defendants' motion for summary judgment, Judge Gunn explicitly found that "plaintiffs are without evidence to support any of the factual allegations of their Complaint." The Court further found that a full "trial would involve the Court in needless—if not abusive—delay and expense."

45. No defendant reasonably believed or could have reasonably believed either that the facts alleged in the *Bastien* Complaint were true, or that the claims asserted in the *Bastien* Complaint were valid under applicable law. All defendants knew or should have known that the claims they asserted were without support in the facts and the law.

46. Defendants intentionally initiated and pursued the *Bastien* litigation for improper and wrongful purposes. Those improper purposes included recouping the tax benefits of the challenged investments which had been lost when the Internal Revenue Service disallowed certain tax deductions they had claimed in connection with the investments. Those improper purposes included, on the part of the attorney/defendants, earning a lucrative contingent fee for prosecuting the meritless Complaint.

47. The *Bastien* litigation was a sham conceived and perpetuated by the defendants in an effort to force Irving Cohen (and the other *Bastien* defendants) to bear the financial risk of the highly risky investments which the defendants knowingly made in the hope of obtaining great profits.

48. Plaintiff Irving Cohen has incurred and continues to incur attorneys' fees, costs and expenses (which currently exceed $250,000) in defending the baseless *Bastien* litigation.

COUNT I

(Malicious Prosecution)

49. Paragraphs 1-48 are realleged and incorporated herein by reference.

50. Defendants initiated a civil proceeding against plaintiff, *Jack D. Bastien, et al. v. R. Rowland & Co., et al.*, which terminated in favor of Irving Cohen on a motion for summary judgment. This judgment was subsequently affirmed by the United States Court of Appeals for the Eighth Circuit, and certiorari was denied by the United States Supreme Court.

51. The *Bastien* action was initiated by defendants without probable cause. No defendant reasonably believed or coud have reasonably believed that the facts alleged in the *Bastien* Complaint were true or that the claims asserted in the *Bastien* Complaint were valid under applicable law.

52. Defendants acted wrongfully, intentionally, with malice and without just cause in initiating the *Bastien* litigation.

53. Defendants initiated the *Bastien* litigation for wrongful purposes and with improper motives, as alleged in the previous paragraphs of this Complaint. Defendants initiated the *Bastien* litigation to penalize, embarrass and injure the *Bastien* defendants, including Irving Cohen. In initiating the *Bastien* litigation, the defendants acted with malice, ill will, spite and vindictiveness toward Irving Cohen.

54. As a result of defendants' malicious prosecution of the *Bastien* litigation, plaintiff has been injured and has suffered damage. For example, Irving Cohen has, to date, incurred over $219,000 in attorneys' fees and over $34,000 in costs and expenses to defend against the *Bastien* litigation. Irving Cohen's injury and damage is continuing.

COUNT II

(Malicious Prosecution)

55. Paragraphs 1-54 are realleged and incorporated herein by reference.

56. Defendants maintained and conducted a civil proceeding against plaintiff, *Jack D. Bastien, et al. v. R. Rowland & Co., et al.*, which terminated in favor of Irving Cohen on a motion for summary judgment. This judgment was subsequently affirmed by the United States Court of Appeals for the Eighth Circuit, and certiorari was denied by the United States Supreme Court.

57. Defendants acted wrongfully, intentionally, with malice and without just cause in maintaining and conducting the *Bastien* litigation.

58. The *Bastien* action was maintained and conducted by defendants without probable cause. No defendant reasonably believed or could have reasonably believed that the facts alleged in the *Bastien* Complaint were true or that the claims asserted in the *Bastien* Complaint were valid under applicable law.

59. Defendants maintained and conducted the *Bastien* litigation for wrongful purposes and with improper motives, as alleged in the previous paragraphs of this Complaint. Defendants maintained and conducted the *Bastien* litigation to penalize, embarrass and injure the *Bastien* defendants, including Irving Cohen. In maintaining and conducting the *Bastien* litigation, the defendants acted with malice, ill will, spite and vindictiveness toward Irving Cohen.

60. Judge Gunn has specifically found that the *Bastien* plaintiffs and their attorneys conducted the *Bastien* litigation in a "frivolous and abusive" manner.

61. As a result of defendants' malicious prosecution of the *Bastien* litigation, plaintiff has been injured and

has suffered damage. For example, plaintiff has, to date, incurred over $219,000 in attorneys' fees and over $34,000 in costs to defend against the *Bastien* litigation. Plaintiff's injury and damage is continuing.

WHEREFORE, Plaintiff Irving Cohen prays this Court to enter judgment, jointly and severally against each and every defendant, awarding Plaintiff—

(1) On Count I the amount of $500,000 in compensatory damages and $1,000,000 in punitive damages, plus interest, costs, and attorneys' fees;

(2) On Count II the amount of $500,000 in compensatory damages and $1,000,000 in punitive damages, plus interest, costs, and attorneys' fees; and

(3) Such other and further relief as this Court deems appropriate.

/s/ Stefan J. Glynias
STEFAN J. GLYNIAS
EVANS & DIXON
314 North Broadway
St. Louis, Missouri 63102

Of Counsel:

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 87-2296/2297EM

DAVID G. LUPO and JAMES A. STEMMLER,
Appellants/Cross-Appellees,

vs.

R. ROWLAND and COMPANY, ETC., *et al.*,
Appellees/Cross-Appellants.

Appeals from the United States District Court
for the Eastern District of Missouri

Appellants' petition for rehearing en banc and supplemental petition for rehearing en banc of James Stemmler have been considered by the Court and are denied.

Judge Theodore McMillian would have granted the petitions.

Petitions for rehearing by the panel are also denied.

January 3, 1989

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2296

DAVID G. LUPO and JAMES A. STEMMLER,
Appellants,

JACK D. BASTIEN, ARTHUR F. O'HARE, JANE S. TSCHUDY, E. LOUIS WERNER, JR., MICHAEL J. KICKHAM, ARLA E. REED, THOMAS W. YAGER and RONALD B. BURT,

v.

R. ROWLAND AND COMPANY, a Missouri Corporation, JOSEPH G. WOHL, CAROL WOHL and DAVID WEISS, Executors, IRWIN M. ROSENTHAL, JACOB W. HELLER, HERMAN SCHWARTZMAN, LEONARD I. WEINSTOCK, DAVID M. GARELIK, ANDREW W. DAVE, MARCEL SHWERGOLD and ELKAN ABRAMOWITZ, EDMOND M. COLLER, RICHARD F. HOROWITZ, HOWARD L. MANN, E. COOKE RAND, HOWARD S. JACOBS, R. MITCHELL MASS, EDWARD FINGERMAN, WEISS, ROSENTHAL, HELLER & SCHWARTZMAN, a dissolved legal partnership, LAVENTHOL & HORWATH, an accounting partnership, RICHARD W. A. DAVIS, RICHARD W. A. DAVIS, as Trustee for RICHARD W. A. DAVIS, INC., a dissolved Florida Corporation, HAROLD RAND, HAROLD RAND, d/b/a HAROLD RAND & COMPANY PUBLIC RELATIONS, JOEL PRESTON, IRVING COHEN, IRVING COHEN, d/b/a THE ASTRO GROUP, LTD., I.C.A. PRODUCTIONS, INC., a dissolved New York Corporation, STANLEY LEVINE, TED SHAPIRO, TED SHAPIRO, d/b/a THE ASTRO GROUP, LTD., RAYMOND E. ROWLAND, JR., ROBERT R. RUST,
Appellees.

No. 87-2297

DAVID G. LUPO and JAMES A. STEMMLER,
Appellees,

JACK D. BASTIEN, ARTHUR F. O'HARE, JANE S. TSCHUDY, E. LOUIS WERNER, JR., MICHAEL J. KICKHAM, ARLA E. REED, THOMAS W. YAGER and RONALD B. BURT,

v.

E. ROWLAND and COMPANY, a Missouri Corporation,
Appellant,

JOSEPH G. WOHL, CAROL WOHL and DAVID WEISS, Executors, IRWIN M. ROSENTHAL, JACOB W. HELLER, HERMAN SCHWARTZMAN, LEONARD I. WEINSTOCK, DAVID M. GARELIK, ANDREW W. DAVE, MARCEL SHWERGOLD and ELKAN ABRAMOWITZ, EDMOND M. COLLER, RICHARD F. HOROWITZ, HOWARD MANN, E. COOKE RAND, HOWARD S. JACOBS, R. MITCHELL MASS, EDWARD FINGERMAN, WEISS, ROSENTHAL, HELLER & SCHWARTZMAN, a dissolved legal partnership, LAVENTHOL & HORWATH, an accounting partnership, RICHARD W. A. DAVIS, RICHARD W. A. DAVIS, as Trustee for RICHARD W. A. DAVIS, INC., a dissolved Florida Corporation, HAROLD RAND, HAROLD RAND, d/b/a HAROLD RAND & COMPANY PUBLIC RELATIONS, JOEL PRESTON, IRVING COHEN, IRVING COHEN, d/b/a THE ASTRO GROUP, LTD., I.C.A. PRODUCTIONS, INC., a dissolved New York Corporation, STANLEY LEVINE, TED SHAPIRO, TED SHAPIRO, d/b/a THE ASTRO GROUP, LTD., RAYMOND E. ROWLAND, JR., ROBERT R. RUST,
Appellants.

Appeals from the United States District Court
for the Eastern District of Missouri

Submitted: May 10, 1988

Filed: September 20, 1988

JUDGMENT

Before WOLLMAN and BEAM, Circuit Judges, and RE,* Chief Judge.

BEAM, Circuit Judge.

David G. Lupo and James Stemmler appeal the imposition of sanctions under Fed. R. Civ. P. 11 in the amount of $50,000 for conducting litigation in bad faith and in a frivolous and abusive fashion. We affirm.

I. FACTS

Lupo and Stemmler are attorneys who represented eight plaintiffs in a securities fraud case. The suit was brought against R. Rowland and Co., Inc., a St. Louis brokerage firm, two of Rowland's officers, an accounting firm, members of a New York law firm and others involved with the syndication of limited partnerships. The plaintiffs had purchased, through Rowland, partnership interests in five limited partnerships with which the other defendants were involved. The limited partnerships were organized to purchase and distribute motion pictures, a highly speculative and risky venture. The plaintiffs in-

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* The HONORABLE EDWARD D. RE, Chief Judge, United States Court of International Trade, sitting by designation.

vested in the partnerships for the primary purpose of sheltering their other income through the use of income tax deductions created through partnership participation. However, the Tax Reform Act of 1976 placed limits on the tax benefits the plaintiffs derived from their investment. In addition, the partnerships proved to be unprofitable. As a result, the plaintiffs filed suit alleging that the defendants defrauded them of their investment by organizing the partnerships in such a way that the general partners were yielded benefits but the limited partners did not receive a profit.

Discovery took almost four years and when the trial finally began on March 17, 1986, the district court instructed the plaintiffs that they would have three days to present sufficient evidence to overcome the defendants' motions for summary judgment. If at the end of the three days the plaintiffs had failed to present sufficient evidence, the court stated that it would grant the defendants' motions.

After three days of presentation of evidence by the plaintiffs, the court dismissed the jury. On March 31, 1986, the court sustained the defendants' motions for summary judgment. This was noted by an entry on the courtroom minute sheet by the court's deputy clerk and by an entry on the court's docket book.

On April 17, 1986, the district court filed an opinion explaining the basis of the March 31, 1986, ruling and stating that summary judgment was granted on March 31, 1986.

On May 7, 1986, the defendants filed a joint application for attorneys' fees and costs pursuant to Fed. R. Civ. P. 11. On August 7, 1987, the court ordered a total of $100,000 in sanctions under Rule 11 and assessed $50,000 of those sanctions against Lupo and Stemmler, who appeal the imposition of sanctions against them. The remaining $50,000, which was assessed against the plaintiffs in the case, has been paid.

II. DISCUSSION

A. Jurisdiction to Impose Rule 11 Sanction

Lupo and Stemmler first assert that the district court lacked jurisdiction to impose Rule 11 sanctions because the defendants' application for such relief was not timely filed. Rule 30, of the Local Rules of the United States District Court for the Eastern District of Missouri requires a claim for attorneys' fees to be filed no later than "twenty-one (21) days after entry of judgment on the merits." The defendants filed their request on May 7, 1986, 20 days after the filing of the district court's opinion but more than 21 days after the entry on the docket noting the granting of summary judgment. Lupo and Stemmler claim that the entry of the judgment on the docket constituted entry of judgment on the merits for purposes of Local Rule 30. However, every judgment is required by Fed. R. Civ. P. 58 to be set forth on a separate document. Therefore the granting of the defendants' motions for summary judgment cannot have constituted the entry of judgment on the merits as required by Local Rule 30 because there was no separate document involved. Neither the courtroom minute sheet nor the court's docket book constitute a separate document. *See generally United States v. Indrelunas*, 411 U.S. 216 (1973).

The district court's memorandum and order dated April 17, 1986, is also not a final order under Rule 58. In *Baity v. Ciccone*, 507 F.2d 717, 718 (8th Cir. 1974), we found that the "requirement [of a separate document] is not met by a provision within a court's memorandum opinion and order to the effect that judgment be entered." In order to meet this requirement, a separate document must be prepared "which is distinct from any other document entered in the case * * *." *Cloyd v. Richardson*, 510 F.2d 485, 486 (6th Cir. 1975). Therefore in actuality there was no entry of judgment on the merits from which the 21 day time limit of Local Rule 30 began.

However, an appeal was heard by this court on the merits of the case, *Bastien v. R. Rowland & Co.*, No. 86-1519 (8th Cir. Mar. 25, 1987) (cited at 815 F.2d 713), and this issue was apparently not raised by the parties. They have, therefore, waived any objection they may have had regarding this issue. *See Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978) (per curiam). It is clear that it was the intent of the district court that the entry of judgment was to occur with the filing of the memorandum and order. *Bastien v. R. Rowland & Co.*, 116 F.R.D. 619, 621 n.1 (E.D. Mo. 1987) (*Bastien II*). Therefore we deem the entry of final judgment in this case to have been no earlier than April 17, 1986, and find that the defendants' joint application for attorneys' fees and costs was timely made.

Lupo and Stemmler claim, in the alternative, that the defendants' Rule 11 motion was a motion to amend the judgment under Fed. R. Civ. P. 59(e) and, therefore, was to have been filed within 10 days of the entry of judgment. Lupo and Stemmler assert that even assuming judgment was entered on April 17, 1986, the defendants' motion was not filed within the required 10 days and, therefore, the district court lacked jurisdiction to impose sanctions. However, we held in *Obin v. District No. 9 of the Int'l Ass'n of Machinists*, 651 F.2d 574 (8th Cir. 1981) that an application for attorneys' fees is a collateral and independent claim and need not be filed within the 10 day time period for motions under Rule 59(e). The Supreme Court agreed with this finding in *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 450 (1982) stating that the purpose of Rule 59(e) is to permit a court "to rectify its own mistakes in the period immediately following the entry of judgment." While neither of these decisions squarely considered the issue of the relevance of Rule 59(e) to Rule 11 sanctions, we find that the analysis of these cases is applicable. "We

conclude * * * that a [Rule 11] motion * * * raises a collateral and independent claim, not * * * a matter integral to the merits of the action." *Obin*, 651 F.2d at 582. Therefore the 10 day requirement of Rule 59(e) is not applicable.

B. Imposition of Sanctions Under Rule 11

Rule 11 states, in pertinent part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. * * * If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Lupo and Stemmler assert that no specific papers filed with the court by the plaintiffs were designated as violating Rule 11 in either the defendants' joint application for attorneys' fees and expenses or the district court's order imposing sanctions. Therefore, Lupo and Stemmler claim that the imposition of Rule 11 sanctions was inappropriate.

The district court based its decision to impose sanctions upon the full record of the case. "It "conclude[d] that plaintiffs' counsel conducted the litigation in a manner

that escalated costs unnecessarily and vexatiously." *Bastien II*, 116 F.R.D. at 621. The district court also concluded that "the conduct of the litigation * * * was frivolous and abusive and not directed toward the 'just, speedy and inexpensive determination of [the] action.'" *Id.* (citing Fed. R. Civ. P. 1). Lupo and Stemmler urge that it is fundamentally unfair for the district court to have based the sanctions on the "bulk of the filings" and the "conduct" of the litigation because they were not given sufficient notice as to which papers were the basis of the court's ruling. Without fair notice of the alleged Rule 11 violations, Lupo and Stemmler claim that the evidentiary hearing afforded them under Rule 11 was rendered meaningless.

We recognize that "[t]he imposition of sanctions is a serious matter and should be approached with circumspection." *O'Connell v. Champion Int'l Corp.*, 812 F.2d 393, 395 (8th Cir. 1987). Although we prefer that courts identify specific pleadings or other documents when imposing Rule 11 sanctions, we find that the district court had adequate support for proceeding as it did and that Lupo and Stemmler had fair notice of the basis of the court's ruling. The purpose of Rule 11 is to "compensat[e] the offended party for the expenses caused by a violation as well as penaliz[e] the offender * * *." *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 201 (1985). As the district court noted in its memorandum and order granting the defendants' motions for summary judgment, "[t]he history of this case * * * is tortured." *Bastien v. R. Rowland & Co.*, 631 F. Supp. 1554, 1557 (E.D. Mo. 1986) (*Bastien I*). The parties were involved in constant battles over the scope and priority of discovery, and eventually in December of 1985, a Special Master was appointed to preside over the taking of all depositions. In February of 1984, nearly 19 months after the filing of the original petition, the plaintiffs sought leave of the court to file an amended complaint, adding a count under the Racketeer

Influenced and Corrupt Organizations (RICO) Act. In December of 1985, plaintiffs began attempts to delay the trial following the incapacitation of Lupo due to illness. This is only a brief review of the facts that the district court considered in deciding to sanction Lupo and Stemmler as well as the plaintiffs in the case. In its earlier summary judgment decision, the district court provided a more detailed summary of the events leading up to trial. *Bastien I*, 631 F. Supp. at 1554-59.

Our review of the facts reveals overwhelming support for the imposition of the sanctions. The defendants as a whole spent over $1,000,000 defending this case. In fact, "[t]he costs of this prolonged litigation have far exceeded the amount of investment capital which is its subject matter." *Bastien*, slip op. at 2. As such, we find that the $50,000 sanction was certainly well within the parameters of reasonability and that the district court did not abuse its discretion in imposing the sanctions. The amended petition adding the RICO count certainly meets the requirement of a pleading signed in violation of Rule 11. The claim was not "well grounded in fact" or "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law * * *." Fed. R. Civ. P. 11.

In addition to supporting the Rule 11 sanctions, the district court's findings were broad enough to support sanctions under 28 U.S.C. § 1927. Section 1927 authorizes sanctions against any attorney "who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously * * *." The district court found that Lupo and Stemmler had "conducted the litigation in a manner that escalated costs unnecessarily and vexatiously." *Bastien II*, 116 F.R.D. at 621. Giving great deference to the findings of fact and conclusions of the district court as required *Kurkowski v. Volcker*, 819 F.2d 201, 203 n.8 (8th Cir. 1987), we find that this provides us with an alternative ground for affirmance.

IV. CONCLUSION

For the foregoing reasons, the decision of the district court is affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1519

JACK D. BASTIEN, ARTHUR F. O'HARE, JANE S. TSCHUDY, E. LOUIS WERNER, JR., MICHAEL J. KICKHAM, ARLA E. REED, THOMAS W. YAGER and RONALD B. BURT,
Appellants,

v.

R. ROWLAND AND COMPANY, a Missouri Corporation, JOSEPH G. WOHL, CAROL WOHL and DAVID WEISS, Executors, IRWIN M. ROSENTHAL, JACOB W. HELLER, HERMAN SCWARTZMAN, LEONARD I. WEINSTOCK, MARCEL SHWERGOLD and ELKAN ABRAMOWITZ, HOWARD L. MANN, E. COOKE RAND, HOWARD S. JACOBS, R. MITCHELL MASS, EDWARD FINGERMAN, WEISS ROSENTHAL, HELLER & SCHWARTZMAN, a dissolved legal partnership, LAVENTHOL & HORWATH, an accounting partnership, RICHARD W. A. DAVIS, RICHARD W. A. DAVIS, as Trustee for RICHARD W. A. DAVIS, IND., a dissolved Florida corporation, HAROLD RAND, HAROLD RAND, d/b/a HAROLD RAND & COMPANY PUBLIC RELATIONS, JOEL PRESTON, IRVING COHEN, d/b/a THE ASTOR GROUP, LTD., I.C.A. PRODUCTIONS, INC., a dissolved New York corporation, STANLEY LEVINE, TED SHAPIRO, TED SHAPIRO d/b/a THE ASTOR GROUP, LTD., RAYMOND E. ROWLAND, JR., ROBERT R. RUST,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: February 9, 1987

Filed: March 25, 1987

Before ROSS, BOWMAN, and MAGILL, Circuit Judges.

PER CURIAM.

Jack D. Bastien, et al. ("Bastien") appeal the district court's [1] order of summary judgment in favor of R. Rowland and Co., Inc., et al. ("Rowland") in this action for securities fraud, common law fraud, conversion, breach of fiduciary relationship and violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68 (1982 & Supp. II 1984). For reversal, Bastien asserts various errors in the district court's orders regarding discovery, the denial of a continuance and the entry of summary judgment.

The costs of this prolonged litigation have far exceeded the amount of investment capital which is its subject matter. In 1975 and 1976, Bastien purchased through R. Rowland and Co., Inc., a St. Louis securities broker, interests in five limited partnerships organized for the purpose of buying and distributing motion pictures. Prior to purchase, each investor was informed in writing that the securities were "high risk" investments, and that any potential tax benefits flowing from the investments were contingent upon the then-operative tax laws remaining in effect.

At the time of the sale of the limited pertnership interests, federal tax law permitted investors in such partner-

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[1] The Honorable George F. Gunn, United States District Judge for the Eastern District of Missouri.

ships to take deductions for depreciation and investment credit in excess of the amount of their investment. The Tax Reform Act of 1976 limited the allowable deduction for motion picture limited partnerships to the initial amount of investments, however. The change in the tax law meant that Bastien could not use the limited partnership investment to shelter income as anticipated at the time of purchase and, because the motion pictures were not profitable, Bastien received no return of capital on the investment. More than six years later, in June 1982, Bastien filed suit in the district court.

After nearly four years of discovery, which culminated in the imposition of sanctions against Bastien's attorneys for obstructing discovery and the appointment of a special master to prevent further abuses, Rowland moved for summary judgment on March 4, 1986. On March 31, the district court granted these motions, reasoning that Bastien failed to produce any evidence of material misrepresentation or other wrongdoing by Rowland.

Summary judgment is proper

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). A moving party is clearly entitled to "judgment as a a matter of law" against a party who, after adequate time for discovery, fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2552-3 (1986).

The district court carefully analyzed Bastien's evidentiary burdens for the causes of action in question. The lengthy record before us supports the district court's con-

clusion that Rowland is entitled to judgment as a matter of law. Bastien's remaining claims are without merit. Accordingly, we affirm the summary judgment of the court, based on its well-reasoned opinion. *See* 8th Cir. R. 14.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-950C(6)

JACK D. BASTIEN, *et al.*,
Plaintiffs,

v.

R. ROWLAND & CO., INC., *et al.*,
Defendants.

ORDER

(Filed: August 7, 1987)

This matter is before the Court on the joint application of defendants for attorneys' fees and expenses. The Court has reviewed the record and the affidavits submitted in support of and in opposition to defendants' application, heard argument on the appropriateness of a fee award pursuant to Rule 11, Fed.R.Civ.Pro., and held an evidentiary hearing at which individual plaintiffs testified to their personal involvement in thhe filing and conduct of this litigation. Upon consideration of the history and purpose of Rule 11, the Court concludes that a partial fee award is appropriate in this case. Accordingly,

IT IS HEREBY ORDERED that plaintiffs and their counsel pay to defendnats a sanction in the amount of $100,000.00. $50,000.00 shall be paid by counsel for plaintiffs. $25,000.00 shall be paid by plaintiff E. Louis Werner. The remaining $25,000.00 shall be paid in equal parts by plaintiffs Jack D. Bastien, Arthur F. O'Hare, Jane S. Tschudy, Michael J. Kickham, Arla E. Reed, Thomas W. Yager and Ronald B. Burt.

On March 25, 1987 the Eighth Circuit Court of Appeals affirmed this Court's order granting summary judgment to defendants in the above-syled cause of action. In its opinion the Court of Appeals highlighted the distinguishing characteristic of this lawsuit: "The costs of this prolonged litigation have far exceeded the amount of investment capital which is its subject matter." *Bastien v. Rowland*, slip op. No. 86-1519 (8th Cir., March 25, 1987) (per curiam).[1] On the eve of trial, after nearly four years in which to conduct discovery, plaintiffs stood wholly without proof of their claims. Defendants have filed affidavits in support of their application for fees and expenses reflecting expenditures in defense of this ultimately meritless litigation that approach one million dollars ($1,000,000.00).

Amended Rule 11 of the Federal Rules of Civil Procedure directs a trial court to "impose . . . an appropriate sanction" against the person who signed [a pleading] a represented party, or both," upon a determination that the pleading was unfounded or interposed for improper purposes. The decision to award sanctions is discretionary with the trial court, as is the identification of the "appropriate sanction" and, if a fee award, the appropriate amount. *See generally Advisory Committee Notes to Rule 11* ("The court . . . retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case. . . ."). The standard for review of an attorney's conduct for purposes of the Rule is objective: "[S]anctions shall be imposed [if], after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is war-

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[1] This Court set forth an extensive procedural history of the case in its order granting summary judgment of April 17, 1986. A cursory review of the twenty-four volume case file provides ample illustration of the manner in which this litigation was conducted. The Court will not, therefore, repeat the tangled narrative.

ranted by existing law. . . ." *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985).

Rule 11 does not address the procedural rights of attorneys and clients who are threatened with sanctions, and the development of the law is unclear. *See Donaldson v. Clark*, slip op. No. 85-8270 (11th Cir. June 24, 1987); *Eastway Construction Corp. v. City of New York*, 637 F.supp. 558, 568 (E.D. N.Y. 1986); *reversed in part on other grounds*, 1987-1 Trade Cas. (CCH) ¶ 67,601 at 60,602 (2d Cir. June 8, 1987). While the courts are correctly concerned with cost escalation—particularly in a case such as the one before this Court—at least minimum due process safeguards must be ensured. *See Advisory Committee Notes to Rule 11.*

This Court, already familiar with the record in this matter, heard oral argument on defendants' motion and provided plaintiffs the opportunity to make a record on their participation in the litigation. The Court believes that the due process rights of neither plaintiffs nor their counsel have been jeopardized by the proceedings on the Rule 11 issue.

Upon consideration of the record in this case the Court concludes that plaintiffs' counsel conducted the litigation in a manner that escalated costs unnecessarily and vexatiously. Whether or not a competent attorney could form a reasonable belief as to the viability of the original complaint, the conduct of the litigation from the time this Court inherited the file in 1985, which comprises the bulk of the filings, was frivolous and abusive and not directed toward the "just, speedy and inexpensive determination of [the] action," Rule 1, Fed.R.Civ.Pro. The Court does not hold plaintiffs blameless. This was their litigation, and their counsel must be deemed to have acted at their direction.

At the outset of trial the Court stated its belief that plaintiffs should settle their claims against defendants.

Testimony at the July 30th hearing established that seven of the plaintiffs were prepared to agree to a settlement. Because plaintiff Werner refused to engage in good faith efforts to resolve the litigation without incurring the costs of trial, the Court finds that he should bear the greater share of costs imposed on plaintiffs.

$100,000.00 represents a fraction of the fees and costs incurred by defendants in this suit. The Court will not, therefore, engage in a determination of the reasonableness of particular fees and costs charged to its defense. The Court finds the amount appropriate as a sanction for bad faith conduct on the part of plaintiffs and their counsel.

Dated this 7th day of August, 1987.

/s/ George F. Gunn, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-950C

Court No. 6

JACK D. BASTIEN, *et al.*,
Plaintiffs,

v.

R. ROWLAND & CO., INC., *et al.*,
Defendants.

PLAINTIFFS' RESPONSE AND OBJECTIONS TO DEFENDANTS' JOINT APPLICATION FOR ATTORNEYS' FEES AND EXPENSES

(Filed: May 14, 1987)

Comes now Plaintiffs in response to and objects to Defendants' Joint Application for Attorneys' Fees and Expenses and state:

1. Ordinarily, the prevailing party *cannot* obtain attorneys' fees from the losing party. *Sterling Energy Ltd. v. Friendly National Bank*, 744 F.2d 1433, 1435[1] (10th Cir. 1984); *Hall v. Cold*, 412 U.S. 1, 4-5 (1973); *F.D. Rich Co. v. Industrial Lumber Co.*, 917 U.S. 116, 126 (1974).

2. "It is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a Plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindslight logic could

discourage all but the most airtight claims, for seldom can a prospective Plaintiff be sure of ultimate success." *Actor's Equity Ass'n v. American Dinner Theatre*, 802 F.2d 1038, 1042 (8th Cir. 1986).

3. Within the bad faith exception there must be a high degree of specificity in the actual charges and factual findings of bad faith by the Court and the issue is whether a reasonable attorney could have concluded that facts supporting the claim *might be estab'ished*, not whether such facts *actually had bene established. Dow Chemical Pacific Ltd. v. Rascator Maritime S.A.*, 782 F.2d 329, 344 (2nd Cir. 1986). Judged by the "high degree of specificity" standard Defendants' Joint Motion is devoid of substance, containing only a plethora of generalities.

4. "In the absence of a statute or enforcable contract to the contrary, the prevailing litigant is *not entitled* to collect attorneys' fees from his opponent." *Actor's Equity Assn. v. American Dinner Theatre*, supra at 1041 (8th Cir. 1986); *Lackawanna Leather v. United Food & Com. Workers*, 706 F.2d 228, 232 (8th Cir. 1983); *Syufy Enterprises v. American Multicinema, Inc.*, 602 F.Supp. 1466, 1472 (N.D. Ca. 1983); *Alyeska Pipeline Service Co. v. Wilderness Society*, 926 U.S. 290, 257-60 (1975); *U.S. v. Standard Oil Co. of California*, 603 F.2d 100, 103 (9th Cir. 1976).

5. Even if a District Court believes that a case is without merit, it does not mean that the case was frivolous or taken in bad faith. *Manhattan Coffee Co. v. International Brotherhood of Teamsters, et. al.*, 743 F.2d 621, 624-625 (8th Cir. 1984).

6. Defendants' Joint Application relies on three theories for the imposition of attorneys' fees and expenses against Plaintiffs; the American Rule (Bad Faith Rule); Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927, all of which require some showing of bad

faith, *Oliveri v. Thompson*, 803 F.2d 1265, 1271-1275 (2nd Cir. 1986).

7. Under the American rule, the Court may award attorneys' fees when the opposing party has acted in *bad faith, vexatiously, wantonly* or for *oppressive reasons. Actor's Equity Ass'n v. American Dinner Theatre*, supra; *International Union, et al. v. United Form Tool Inc., Speedy Mfg. Division*, 762 76, 77 (8th Cir. 1985); *F.D. Rich Co. v. United States, ex rel., Industrial Lumber Co.*, 417 U.S. 116, 129 (1974); *Hamilton v. Daley*, 777 1207, 1211 (7th Cir. 1985); *Transco Inc. v. AJAC Transmission Parts Co.*, 768 1001, 1025 (9th Cir. 1985), and should only be imposed on the nonprevailing Plaintiffs when the suit is frivolous, unreasonable or without foundation. *Actor's Equity Ass'n v. American Dinner Theatre*, supra at 1042; *Hamilton v. Daley*, supra.

8. Plaintiff and their attorneys have at all times acted in good faith to obtain, analyze and present evidence to support their allegations based upon extensive investigation. Defendants have alleged only generalities, not facts, to the contrary.

9. All motions and requests to this Court were based upon sound arguments of law supported by the Federal Rules of Civil Procedure and relevent cases. A great number of these motions were directed to Defendants to request compliance with Court orders in a attempt to obtain discovery to which Plaintiffs at all times believed in good faith they were entitled.

10. "The 'bad faith' exception to the American Rule is punitive, and the penalty can be imposed only in exceptional cases and for dominating reasons of justice. It requires more than a showing of a weak or legally inadequate case, and the exception is not invoked by findings of negligence, frivolity or improvidence. To be sure, it is an extremely narrow exception. . . ." *Actor's Equity Ass'n v. American Dinner Theatre*, supra. *United States*

v. 2,116 Boxes of Boned Beef, 726 1481, 1488 [6] (10th Cir. 1984). *U.S. v. Standard Oil Co. of California*, supra.

11. "A party acts in bad faith *only* when the claim brought is entirely without color and has been arrested wantonly, for purposes of harassment or delay, or for other improper reasons." *Sterling Energy Ltd. v. Friendly National Bank*, supra.

12. Neither Plaintiffs' counsel nor Plaintiffs devoted the great amount of time, (in excess of 2000 hours) and money (in excess of $200,000.00) merely to harass or oppress the Defendants or delay said cause of action for any reason. There were serious issues of discovery rights and issues of non-compliance, evidenced by the *January 26, 1984* Orders by Judge Noce, and affirmed by Judge Cahill on *June 28, 1985* and further affirmed by Judge Gunn's Order of *Stpember 3, 1986*. There was a one year and seven month period in which all discovery was halter by the Court when Plaintiffs' amended complaint was before the Court.

13. Courts generally require a finding by the trial judge of subjective bad faith, *Sterling Energy v. Friendly National Bank*, supra, although objective bad faith is allowed in finding Rule 11 sanctions. *Oliveria v. Thompson*, supra, at 1275. They require more than a showing of a weak or legally inadequate case. *Cornwall v. Robinson*, 654 685, 687 (10th Cir. 1981).

14. In allegations of violations of Rule 11, an objective standard is adopted whereby sanctions are imposed when it appears that a competent attorney could not form the requisite reasonable belief as to the validity of what is entered in his pleadings, motions, or other paper. *Oliveri v. Thompson*, supra. However, the Court is to *avoid hindsight* and resolve all doubts in favor of the signer and Rule 11 is violated only when it is *patently clear* that a claim has absolutely no chance of success. *Id.*

15. Rule 11 sanctions apply only when an attorney does not conduct a reasonable inquiry into the facts and law supporting the pleading. *O'Connell v. Champion International Corp.*, 812 F.2d 393, 395 (8th Cir. 1987). Plaintiffs' Counsel met with the Plaintiffs during which time Plaintiffs' Counsel conducted an extensive investigation in October, 1980 and suit was not filed until July, 1982. Rule 11 sanctions should not be imposed if the existing law had given Plaintiffs "*a glimmer of a chance*" to prevail on its claim. *Hoover Universal, Inc. v. Brockway Imco, Inc.*, 809 F.2d 1039, 1044 (4th Cir. 1987).

16. Plaintiffs believe the existing law not only gave Plaintiffs more than a glimmer of a chance of success, but supported their success on the merits. Plaintiffs relied primarily upon the cases of *Berger v. Bishop Inv. Corp.*, 695 F.2d 302 (Dec. 10, 1982, 8th Cir.) (in which the Plaintiffs filed an Amicus Curiae Brief citing over 70 cases in support of an implied right of action under 10(b)(5)). *Huddleson v. Herman and McLean*, 640 F.2d 534 (5th Cir. 1981); *Shores Jr., et al. v. Scklar, et al.*, 647 F.2d 962 (5th Cir. 1981); *Affiliated Ute Citizens v. U.S.*, 406 U.S. 128 (1972); *Austin v. Loftsgaarden*, 675 F.2d 168, (8th Cir. 1982) (Plaintiffs obtained the files from counsel in said action and also conferred with said counsel); *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975) (Fraud-On-The-Market Place), *Sharp v. Coopers & Lybrandt*, 457 F.Supp. 879 (E.D. Pa. 1978), and 649 F.2d 1975 (3rd Cir. 1983) (Plaintiffs obtained the files and conferred with counsel in that case); *Ernst and Ernst v. Hochfelder*, 96 S.Ct. 1375 (1976); *Vanderboom v. Sexton*, 922 F.2d 1233 (8th Cir. 1970); *Chris-Craft Industries, Inc. v. Bango Punta Corp*, 426 F.2d 569 (2nd Cir. 1970) and *Escott v. Barchris Construction Co.*, 283 F.Supp. 643 (S.D.N.Y. 1968) to support one or more allegations in the Petition and to withstand Motions to Dismiss all of which gave Plaintiffs more than a glimmer of a chance for success.

17. 28 U.S.C. § 1927 is concerned with limiting the abuse of court procedures and to deter unnecessary delays in litigation. *Jones v. Continental Corp.*, 789 F.2d 1225, 1231 (6th Cir. 1986). However, there must be a clear showing of bad faith. *Id.*

18. This Court's order of *November 8, 1985*, recognizing a minimum of discovery and ordering that all previous orders regarding discovery *against* Defendants be complied with exemplified a belief in Plaintiffs' meritorious good faith efforts to obtain discovery and Defendant's delay and violation of 28 U.S.C. § 1927. In compliance with Judge Noce's order, Plaintiffs requested documentary discovery from Defendants in September, 1985 relating to five (5) additional limited partnerships. Defendants jointly opposed said request. However, the Court ruled in Plaintiffs' favor on November 8, 1985.

19. Had this case been filed without probable cause or in subjective or objective bad faith then this Court would have granted Defendants' Motions to Dismiss in the early stages of this case. Furthermore the Court would not have denied Defendants' Motions for Summary Judgment by its *Order of March 13, 1986* if there were any doubt that the case was taken in bad faith or unreasonably. Defendants had advantage of Plaintiffs' answers to their interrogatories in 1983 and early 1984.

20. In Defendants' Joint Application for Attorney's Fees and Expenses, there is a shot gun list of alleged practices of bad faith on the part of the Plaintiffs. These allegations themselves cannot be substantiated:

> (a) Defendant's first allegation of bad faith is that "the Court has recorded more than 600 docket entries." What the Defendants fail to inform the Court is that approximately 350 of those docket entries were authored by Defendants and over 75 of those entries were authored by Judges and clerks of the Court.

(b) Defendants allege that they were required to respond to and the Court hear and decide more than 70 motions filed by Plaintiffs. Defendants failed to state to the Court that approximately 31 of these motions were motions to compel the Defendants to produce documents and answer interrogatories or were in connection with obtaining other discovery ordered by the Court on January 26, 1984.

1. For example, in regards to document discovery, Plaintiffs requested that Defendant Rand produce documents on October 14, 1983. After five additional requests, including motions to compel and 7(c) discussions, documents were finally received two years and three months later.

2. Plaintiffs originally requested document production from Defendant Attorneys on October 14, 1983. After four additional requests including motions to compel, letter requests, and 7(c) discussions, Plaintiffs began receiving documents nearly two years later and continued to receive documents until the day of trial, March 17, 1986.

3. Plaintiffs originally requested documents on September 15, 1983, from R. Rowland & Co. After additional requests, motions to compel, and 7(c) discussions, eventually received a mere trifle of documents beginning on January 4, 1984. Plaintiffs finally received the remainder of the documents two years and two months later from the original request.

4. Plaintiffs requseted documents on September 21, 1983, from Defendant Cohen. After numerous additional requests by motion to compel, and letter requests, Plaintiffs finally began receiving documents two years later.

5. Plaintiffs requested documents on September 29, 1983, from Defendant Shapiro. After numerous requests by motions to compel, letter requests, and 7(c) discussions, Plaintiffs began receiving documents five months later, but continued to receive the bulk of the documents over the next two years and never received all of the documents as ordered by the Court in its Order of November 8, 1985.

6. On October 17, 1983, Plaintiffs requested interrogatories from Laventhol and Horwath on October 17, 1983. After motions to compel, and 7(c) discussions, Plaintiffs did not completely receive all answers which were sporadically answered over the next two years and three months.

7. Plaintiffs requested answers to interrogatories on August 13, 1985, from Defendant attorneys which still are not completely answered even after numerous 7(c) discussions and the majority of which were not substantially answered until five months later.

8. Plaintiff's requested answers to interrogatories on June 20, 1983 from Defendant Cohen. After numerous motions to compel and 7(c) discussions Plaintiffs have still not received completed answers and sporadicaly received answers answer questionover two and one-half years.

9. Plaintiffs requested answers to interrogatories on June 15, 1983, from Defendant Shapiro. After numerous motions to compel, 7(c) discussions and letter requests, there are still interrogatories unanswered and Plaintiffs received Shapiro's answers sporadically over two and one-half years.

10. Plaintiffs requested answers to interrogatories from R. Rowland and Company on August 13, 1985. After motion to compel, and 7(c) discussions, Defendant still has not answered all interrogatories to this date and the first filing of answers was over 30 days later and was all objections.

11. Furthermore, Judge Cahill stated, *at the July 19, 1984 hearing*, that discovery should be held in abeyance until further order. *He stated that he could not establish discovery schedules until the issue of the RICO amendment was resolved.* For one year and seven months Plaintiffs' motion to amend its complaint was under advisement and not ultimately allowed until September 3, 1986.

12. This court also stayed the above cause of action in September, 1982 to permit filing of Plaintiffs' Amicus Curiae Brief in the *Berger v. Bishop, Inc. Corp.*, supra, case regarding whether an implied right of action existed under Rule 10(b)(5).

13. It is incomprehensible how the Plaintiffs can be accused of delay and obfuscation under these circumstances.

(c) Defendants state that Plaintiffs ignored deposition notices and refused to state whether they would appear for properly noticed depositions. Any deposition at which Plaintiff failed to appear was the subject of a motion for protective order filed before this Court which this Court admits were never addressed by the Magistrate. Plaintiffs did attend every deposition as scheduled by the Court or the Commissioner.

(d) Defendants state that Plaintiffs refused to answer questions regarding ever the most basic facts.

Plaintiffs answered hours of interrogatories and in some cases or two or three separate occasions. Counsel only objected on the basis of attorney-client privilege and work product and never instructed any client not to answer unless they based their non-answer upon those objections.

(e) Defendants state that "the Eighth Circuit Court of Appeals has three (3) times been forced to hear meritless, extraordinary, petitions by Plaintiffs." The Court of Appeals has denied certain writs *without prejudice* and at no time have they used the language meritless. In one instance the Appellate Court stated that it was not the proper time to raise the issue and that the proper time to raise the issue was after final judgment. *Defendants fail to state that they themselves have filed two (2) extraordinary writ petitions, which themselves were denied and in Defendant's terms could be classified as meritless and taken in bad faith.*

(f) Defendants state the "Plaintiffs persistent abuse of discovery required the Defendants to seek orders at every turn to compel even the most ordinary discovery." Plaintiffs obviously complied with all Defendants' Motions ruled upon on *January 26, 1984* by Judge Noce since Defendants did not subsequently file any Motions to Compel as to Interrogatories or Production of Documents since that Order. Plaintiffs could easily adopt this sentence and state that Defendants persistent abuse of discovery required Plaintiffs to seek orders at every turn to compel even the most ordinary discovery as exemplified in paragraph 20(b) (1-12).

(g) Defendants state that "Plaintiffs failed to disclose their expert witnesses for more than a year despite proper interrogatory by the Defendants requesting that information." Plaintiffs at no time failed to disclose, through interrogatories, who their

expert witnesses *for trial* would be. At the time that Plaintiffs knew who their expert witness was and who would testify as to liability at trial he was disclosed in the Answers to Interrogatories on February 5, 1986. Plaintiffs never received all the documentation to assist the one (1) liability expert witness. He was therefore limited to just the five (5) partnerships in which the Plaintiffs invested. The expert witness as to damages was revealed on January 21, 1986. He had not formulated an opinion until December, 1984 but there was no need to reveal his name since all discovery was held in abeyance and Plaintiffs had not obtained any liability experts.

(h) Defendants state that the Plaintiffs repeatedly contested settled issues, such as the propriety of a trial subpoena beyond one hundred miles and continuance of the trial date. Defendants state *issues*, in plural, but can only provide the Court with one instance in which Plaintiffs requested the Court to reconsider an order. That is because it is the only time the Plaintiffs requested the District Court to reconsider any motion which it had ruled and said Motion to Reconsider modified the earlier Motion

(i) Defendants state that the Plaintiffs refused to comply with pre-trial orders. They state that the witness lists were masterpieces of deception. Plaintiffs provided Defendants with a clear list of the witnesses which they intended to call and also a list of witnesses which may be called. Due to the accelerated discovery process which required Plaintiffs to take or participate in thirty-eight depositions in a period of two months, then prepare for trial and then responded to motions for summary judgment, precluded them from contacting the witnesses which they could possibly call. Plaintiffs were not permitted to take depositions of numerous other witnesses disclosed in the documents provided Plaintiffs by

Defendants in November and December of 1985. Most witnesses are not spoken with ahead of time before depositions.

(j) Defendants state that Plaintiffs refused to supply intelligible exhibit lists. Plaintiffs consistently, throughout depositions and subsequent thereto, explained to counsel for Defendants the manner in which they numbered their document exihibits. The Defendants stated that they understood but then *played ignorant* before the court. The documents were numbered as follows:

038-0001 etc.—Documents received from Defendant Shapiro

030-0001 etc.—Documents received from Defendant Rand

033-0001 etc.—Documents received from Defendant Cohen

009-0001 etc.—Documents received from Defendant R. Rowland & Co.

027-0001 etc.—Documents received from Defendant Laventhol & Horwath

026-0001 etc.—Documents received from Defendant Attorneys

JB-0001 etc.—Documents received from Plaintiff Jack Bastien

RB-0001 etc.—Documents received from Plaintiff Ronald Burt

JT-0001 etc.—Documents received from Plaintiff Jane Tsuhudy

AO-0001 etc.—Documents received from Plaintiff Art O'Hare

AR-0001 etc.—Documents received from Plaintiff Arla Reed

MK-0001 etc.—Documents received from Plaintiff Mike Kiokham

LW-0001 etc.—Documents received from Plaintiff Lou Werner

TY-0001 etc.—Documents received from Plaintiff Tom Yaeger

It takes a minimum of intelligence to understand the Plaintiff's numbering system.

(k) Defendants state that the Plaintiffs refused to give copies of the exhibits for trial. Defendants did come to Plaintiff's offices to examine all of their documents. During the depositions, it was agreed, with Judge Bloom present, that the Defendants would examine all the Plaintiffs' documents for the purpose of stipulating to their authenticity for use at trial. No Defendant requested to examine the documents for the purpose of stipulating to their authenticity. The Court, at the pre-trial hearing, stated that the Defendants should examine the documents and stipulate to their authenticity and genuineness. No Defendant complied. but now attempt to blame Plaintiffs for their own neglect. *Under the rule there is no need to provide copies when Defendants have been given the opportunity to examine documents.* Defendant did examine documents in Plaintiffs' possession.

(l) Defendants state that Plaintiffs ignored local rule 7(c). Plaintiffs had 7(c) discussions regarding documents in *1983* with Defendant Rand, Defendant Attorneys, Defendant Cohen, and Defendant Shapiro. Plaintiff had 7(c) discussions regarding documents again in 1985 with Defendant Rand, two with Defendant Attorneys, four with Defendant R. Rowland and Company, once with Defendant Cohen, two with Defendant Shapiro, and one with Defendant Laventhol and Horwath. Plaintiff had 7(c) dis-

cussions in connection with interrogatories in *1983*, twice with Defendant Laventhol and Horwath, once with Defendant Cohen and once with Defendant Shapiro. Plaintiffs had 7(c) discussions in connection with answers to interrogatories in 1985, twice with Defendant attorneys, once with Defendant Cohen, once with Defendant Shapiro, and twice with Defendant R. Rowland and Company.

(m) Defendants state that the Court has been called into session on at least ten different days, three of which were full trial days, and has been harassed by countless letters addressed or copied to the Court's attention. Three full trial days and ten other separate occasions not lasting more than an hour or so, for a case set for a two-month trial, should not be considered harassment of the Court. Furthermore, some of the letters addressed to the Court were for the purpose of informing said Court of the improprieties on the part of Defendants' Attorneys and to correct misstatements to this Court by Defendants' Attorneys.

(n) Defendants state that Plaintiffs were given literally weeks to prepare for and respond to Motions for Summary Judgments. This is another example of counsel for Defendants blatant misstatements. Motions for summary judgments were denied on *March 13, 1987*. Plaintiffs prepared for a two month trial beginning on March 17, 1986. On March 20, 1986, the Court allowed the Plaintiffs even days to prepare a Response to six Motions for Summary Judgment. How the Defendants can interpret eleven days into weeks to prepare and respond to Motions for Summary Judgments in light of the accelerated discovery schedule, of which this Court is well aware, is incomprehensible.

21. Each allegation by Defendants to substantiate bad faith on behalf of Plaintiffs is erroneous and contradicted by the facts and the record of the case.

22. At all times under Rule 11, counsel for Plaintiffs signed and thereby certified that each pleading motion and every other paper filed in this Court and every other Court, was based on fact and warranted by existing law or a good faith argument based upon the laws. If this Court would examine every response by Plaintiffs to Defendants' frivolous motions and allegations as to the Plaintiffs' conduct it *will see that it is the Defendants who fail to provide any cases in many instances or facts to substantiate their broad, unfounded, unsubstantiated statements.*

23. Defendants accuse Plaintiffs' counsel of conducting litigation where counsel's course of conduct in the filing of hundreds of pages of irrelevant documents, in citing dozens of cases unrelated to the real issues . . ., and bringing repetitive motions without a shred of rational basis, and in seeking to resurrect matters long since finally concluded has been at least irresponsible and has come perilously close to the abuse of process. Plaintiffs invite this Court and Defendants to point to any statement or motion by Plaintiff which has not been supported by case law in point or at least legally arguable.

24. Defendants do not point to any particular frivolous motion but believe just because seventy motions were filed by Plaintiffs then that should be dispositive of the matter. This failure is due to the fact that they *cannot.*

25. Plaintiffs have filed several repetitive motions to compel discovery because the Defendants failed to comply with the orders of this Court. Time has been wasted due to Defendants' failure to comply with said orders. On *November 8, 1985*, this Court did enter its order, which is still not complied with, requiring Defendants to comply with all previous discovery orders.

26. Defendants state that Plaintiffs ignored Court orders regarding objections at depositions, failed repeatedly to produce documents, and declined to limit the compass of their own discovery in accordance with the Federal Rules even after orders of the Court requiring them to do so. These allegations are unsubstantiated by any facts but only by the continuous misstatements of Defendants' counsel. Counsel for Plaintiffs have never ignored any Court order regarding objections at depositions *or any other order.* Plaintiffs have produced every document which they received from their clients at the time they received them which the Defendants were entitled to have in accordance with Court orders. At no time did they circumvent a Court order in regards to limiting their own discovery. The Plaintiffs continually requested the Court to enforce prior orders allowing discovery with *which Defendants* continually ignored and refused to comply.

27. Defendants state that Plaintiffs filed a patently frivolous RICO Count in an effort to circumvent the Courts documentary discovery orders. Judge Cahill, at the July 19, 1984 hearing agreed with Counsel for Plaintiffs that an amendment to the complaint should not be allowed if there is a showing of frivolity or bad faith. *The Court allowed counsel to amend its complaint.* Again Defendants can state no facts to support this allegation. Plaintiffs filed a RICO Count based upon the law and the facts alleged in their complaint and added no facts to the Complaint but merely added language sufficient to allege a RICO Count in compliance with the statute.

28. Defendants state that Plaintiffs' failure to notice deponents properly during depositions in New York and California wasted attorney time and travel expenses. Again, the facts contradict this statement by Defendants. *Judge Bloom stated that counsel for Plaintiffs acted in good faith at all times and attempted to fill the deposition schedule which they succeeded in doing.* At no time did

Plaintiffs waste time during those trips. The only lapse in time was when Defendant, Joel Preston, failed to appear at his duly noticed deposition.

29. Defendants state that the Court scrutinized the Plaintiffs' allegations to provide assurance that Plaintiffs had investigated the alleged fraud and reasonably believed that a wrong has occurred. Plaintiffs and Platintiffs' Counsel did not file suit until one and one-half years after first coming into contact with the subject matter. Plaintiffs' Counsel, among other matters, had numerous conferences with Donald Doerge, forcer Vice President of Defendant R. Rowland, who made numerous statements regarding Rowland's lack of due diligence and knowledge that the investors were not receiving all the information normally provided. Frank Johnson was interviewed and agreed to testify as to his knowledge of how the motion picture limited partnerships were set up in 1973-76 period; inflated motion picture prices, non-recourse notes and secret commissions. Plaintiffs' Counsel had conferences with Internal Revenue attorneys and agents in connection with their investigation of Defendants Shapiro, Cohen and Davis. Based upon that investigation, Plaintiffs' Counsel and Plaintiffs reasonably believed that the allegations in the complaints were accurate and supported by evidence.

30. Plaintiffs object to the Defendants' Joint Application for Attorneys' Fees and Expenses for its failure to state any grounds upon which said relief can be granted.

WHEREFORE, Plaintiffs request this Court to deny Defendants Joint Application for Attorneys' Fees and Expenses and any other relief this Court deems just and fair under the premises.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-950C

Court No. 6

JACK D. BASTIEN, *et al.*,
Plaintiffs,

v.

R. ROWLAND & CO., INC., *et al.*,
Defendants.

JOINT APPLICATION FOR ATTORNEYS' FEES AND EXPENSES

(Filed: May 7, 1986)

The defendants in this action respectfully apply to the Court for an award of attorneys' fees and expenses pursuant to Rule 11 of the Federal Rules of Civil Procedure, common law principles governing good faith and fairness in the bringing and conduct of lawsuit and 28 U.S.C. § 1927.[1]

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[1] The defendants also intend to file their Bill of Costs at the conclusion of plaintiffs' appeal as provided for in Rule 54, F.R.Civ.P. and Rule 24 of the Local Rules of the United States District Court for the Eastern District of Missouri. Local Rule 30 requires that applications for attorneys' fees be made within 21 days after formal entry of judgment, hence defendants are required to apply at this time. However, the Court may reserve determining the amount of attorneys' fees until after the appeal and thereby obviate the necessisty of multiple hearings to determine trial and appellate costs and attorneys' fees. *See Lipsig v. National Student Marketing Corp.*, 78 F.R.D. 726 (D.D.C. 1978), *aff'd* 663 F.2d 178 (D.C. Cir. 1980). Should the Court desire to determine the amount of attorneys' fees prior to appeal, defendants request leave to submit the appropriate affidavits.

A. Introduction

Among what is now a multitude of cases in which attorneys' fees have been awarded for bad faith in the filing and conduct of meritless litigation, there is no case more a model of excess, abuse and heedless waste of Court and attorney resources than this case. Since June 15, 1982, when the action was commenced with a press conference on the Courthouse steps, the plaintiffs have practiced obfuscation and delay with consumate mastery. The record clearly documents it:

- The Court has recorded more than *six hundred* docket entries.
- The defendants have been required to respond to and the Court hear and decide more than *seventy* motions filed by plaintiffs.
- The Eighth Circuit Court of Appeals has *three times* been forced to hear meritless extraordinary writ petitions by plaintiffs, each filed after an order directing plaintiffs to go forward with discovery and each obviously an attempt to forestall the progress of the case.
- Plaintiffs' persistent abuse of discovery required defendants to seek orders at every turn to compel even the most ordinary discovery. Plaintiffs ignored deposition notices, refused even to state whether they would appear for properly noticed depositions, thereby requiring defense counsel to appear unnecessarily, refused to answer questions regarding even the most basic facts, ignored Court orders regarding objections at depositions, failed repeatedly to produce documents and at the same time declined to limit the compass of their own discovery in accordance with the Federal Rules, even after orders of Court requiring them to do so.

- After plaintiffs' documentary discovery was limited by Court order to partnerships arguably related to those in which they invested, they filed a patently frivolous RICO count in an obvious effort to circumvent the Court's order.
- Plaintiffs' failure to notice deponents properly during depositions in New York and California wasted attorney time and travel expense.
- Plaintiffs failed to disclose their expert witnesses for more than a year despite proper interrogatories by defendants requesting that information.
- Plaintiffs repeatedly contested settled issues such as the propriety of trial subpoenas beyond 100 miles and continuance of the trial date.
- Plaintiffs refused to comply with even the most rudimentary pretrial orders. Their witness lists were masterpieces of deception, including hundreds of names of persons they had never even contacted. Plaintiffs refused to supply intelligible exhibit lists or even copies of their exhibits.
- Plaintiffs ignored local rules such as Local Rule 7(c) and the ten page brief limitations, despite objecting to requests for relief from that limit by defendants.
- This Court has been called into session on at least ten different days, three of which were full trial days, and has been harassed by countless letters addressed or copied to the Court's attention.

The list goes on and on, as the Court well knows because of its involvement at every stage of proceedings. Such tactics have been and are grounds in themselves for awards of attorneys' fees, even where an action has some merit (as is explained below). But they are particularly egregious and therefore richly justify the award of attorneys' fees where, as here, they have been used

as a shield to conceal the fact that this case is utterly devoid of substantive merit.

Plaintiffs and their counsel can have no excuse for their commencement and maintenance of this frivolous action. When the time came, after nearly four years, for these plaintiffs to put on their proofs, they had none. When given literally weeks to prepare for and respond to motions for summary judgment, plaintiffs could not summon one sheet of paper or one witness to support their claims. For this, plaintiffs kept defendants under the sword of fraud and racketeering charges for four years, forced the expenditure of hundreds of thousands of dollars in defense and wasted untold hours of Court time.

There is a remedy for such deception and abuse. True, it is reserved for the exceptional case. But this is that case. Defendants submit that the only means to justly remedy the complete lack of good faith manifested by plaintiffs and their counsel and to prevent a repetition of such conduct in future litigations is to award attorneys' fees and expenses. Because plaintiffs' bad faith permeated this case from the first press conference to the very end of the case, defendants respectfully submit that it is proper to require plaintiffs or their counsel to pay all reasonable attorneys' fees and expenses incurred in this case.

B. The Law Amply Supports an Award of Fees and Expenses

1. Rule 11

Rule 11 of the Federal Rules of Civil Procedure states the fundamental standard governing the filing of pleadings in any action:

> "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowl-

edge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for tme extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

A leading case in explaining the obligations of Rule 11 is *Eastway Construction Corporation v. City of New York*, 762 F.2d 243 (2d Cir. 1985). In upholding an award of attorneys' fees after entry of summary judgment, the Court explained Rule 11 as follows:

"The language of the rule, which was amended in 1983, provides a striking contrast to the words of its predecessor. Prior to the 1983 amendment, the rule spoke in plainly subjective terms: An attorneys' certification of a pleading was an assertion that "to the best of his knowledge, information, and belief, there [was] good ground to support it. The rule, therefore, contemplated sanctions only where there was a showing of bad faith, *Nemeroff*, *supra*, 620 F.2d at 348, and the only proper inquiry was the subjective belief of the attorney at the time the pleading was signed.

The addition of the words "formed after a reasonable inquiry" demand that we revise our inquiry. *See* Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181 (1985). No longer is it enough for an attorney to claim that he acted in good faith, or that he personally was unaware of the groundless nature of an argument or claim. For the language of the new Rule 11 explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the validity of a pleading before it is signed. Simply put, subjective good faith no longer provides the safe harbor it once did.

> The notes of the Advisory Committee on Rules appear to support this expanded reading of the rule. The Committee was frank in admitting that, "in practice Rule 11 has not been effective in deterring abuses." *See also*, 5 Wright & Miller, *Federal Practices and Procedure*: Civil § 1334 (1971). Thus, the drafters speak of the amended rule as an attempt to "build[] upon and expand[]" the equitable doctrine. To this end, they state, the new language is "intended to reduce the reluctance of courts to impose sanctions . . . *by emphasizing the responsibilities of the attorney*" (emphasis added). Finally, the drafters make absolutely clear that the standard is more stringent than the orginal good faith formula set forth in *Nemeroff, supra.*
>
> In light of the express intent of the drafters of the new Rule 11, and the clear policy concerns underlying bad faith is no longer required to trigger the sanctions imposed by the rule. Rather, sanctions shall be imposed against an attorney and/or his client when it appears that a pleading has been interposed for any improper purpose, or where, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.

The "objective" standard of *Eastway* has been favorably cited by the Eighth Circuit in upholding a fee award. *See Moore v. City of Des Moines*, 766 F.2d 343 (8th Cir. 1985). *See also Miller v. United States*, No. 84-2698-C(1) (E.D. Mo. March 20, 1985) (Nangle, J.) (Fees awarded as a result of frivolous suit); *Hasty v. Paccar, Inc.*, 583 F.Supp. 1577 (E.D. Mo. 1984) (Nangle, J.) (Court invited Motion for Sanctions where plaintiff in frivolous suit had not made reasonable investigation); *Fisher v. CPC International, Inc.*, 591 F.Supp. 228 (W.D.

Mo. 1984) (joint liability imposed on plaintiff and attorney in frivolous suit—suit "had no basis in law from the very beginning"); *See also* e.g. *Di Silvestro v. United States*, 767 F.2d 30 (2d Cir. 1985); *Miller v. Schweickart*, 413 F.Supp. 1059, 1061-62 (S.D.N.Y. 1979); *Rhinehart v. Stauffer*, 638 F.2d 1169, 1171 (9th Cir. 1980).

The requirements to investigate and bring only good faith claims are particularly stringent where, as here, the plaintiffs allege fraud. The courts scrutinize a plaintiff's allegations "to provide assurance that plaintiff has investigated the alleged fraud and reasonably believes that a wrong has occurred." *Richardson v. Whie, Weld & Co.*, [1978] Fed. Sec. L. Rep. (CCH) ¶ 96-448 at 99,611-2 (S.D.N.Y. 1978). Thus, for example, in *Segal v. Gordon*, 467 F.2d at 602 (2nd Cir. 1982), the Second Circuit dismissed a complaint with conclusory allegations in a shareholder derivative action "obviously filed on the basis of little investigation or research," 467 F.2d at 608, and the court cautioned that, "[a] complaint alleging fraud should be filed only *after* a wrong is reasonably believed to have occurred. . . ." *Id.* at 607-08 (emphasis added). *See also, Lewis v. Varnes*, 368 F.Supp. 45, 47 (S.D.N.Y.), *aff'd on other grounds*, 505 F.2d 785 (2nd Cir. 1974).

The redress for a violation of Rule 11 "may include an order to pay to the other party . . . the amount of the reasonable expenses incurred because of the filing of the pleading . . . including a reasonable attorney's fee." Fed.R.Civ.P. 11. And the award of fees and costs may be assessed against the attorney personally, as well as parties, *See Fisher, supra* at 235-37. *See also*, Wright & Miller, *Federal Practice and Procedure, Civil* § 1334 at 111 (1982 Supp.); *Miller v. Schweickart*, 413 F.Supp. 1059 (S.D.N.Y. 1976); *Kinee v. Abraham Lincoln Federal Savings & Loan Ass'n.*, 365 F.Supp. 975 (E.D. Penn. 1973).

Based upon plaintiffs' complete inability to produce evidence of fraud and racketeering and upon their repeated

abuses during the litigation it is clear that an award of both attorneys' fees and expenses is appropriate under Rule 11.

2. Good Faith.

As this Court recognized in citing *Jaquette v. Blackhawk County*, 710 F.2d 455 (8th Cir. 1983), the fundamental obligation of good faith which is a prerequiste to use of the courts is breached where a party engages in "frivolous claims, unnecessary and extended discovery and extended motion practice." *Id.* at 461. Courts have the inherent power to remedy such breaches, quite apart from Rule 11, and may award attorneys' fees, expenses and other appropriate relief. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765-67 (1980); *Hutto v. Finney*, 437 U.S. 678, 689 n. 14 (1978); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975); *Doe v. Poelker*, 515 F.2d 541, 547 (8th Cir. 1975) *rev'd on other grounds* 432 U.S. 519 (1977); *Class v. Norton*, 505 F.2d 123, 127 (2d Cir. 1974); *Fisher v. CPC International, Inc., supra.* Even where a claim is filed in good faith (as this case demonstrably was *not*), conduct causing an undue expenditure of court and attorney time justifies taxing attorney's fees and expenses against the offending parties:

> "[B]ad faith does not require that the legal and factual bases for action prove totally frivolous; where a litigant is substantially motivated by vindictiveness, obduracy, or *mala fides*, the assertion of a colorable claim will not bar the assessment of attorneys' fees against him."

Lipsig v. National Student Marketing Corp., 663 F.2d 178 (D.C. Cir. 1980). It is appropriate under the common law good faith standard, as it is under Rule 11, to tax attorneys' fees and expenses against either the offending party or his attorney, or both. *Jaquette, supra* at 462.

3. 28 U.S.C. § 1927

The duty to exercise the utmost care and responsibility in initiating and prosecuting a lawsuit is codified and expressly placed on the shoulder of the attorney for a party in 28 U.S.C. § 1927, which provides:

> "Any attorney or person admitted to conduct cases in any court of the United States or any Territory thereof who so multiples the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct."

Thus, counsel may be assessed fees personally for disregarding the obligation of good faith and unduly multiplying the litigation. In *Limerick v. Greenwald*, 749 F.2d 97 (1st Cir. 1984), the court was faced with counsel who conducted litigation according to the same school as plaintiffs' counsel here:

> "Counsel's course of conduct in the filing of hundreds of pages of irrelevant documents, in citing dozens of cases unrelated to the real issues . . ., in bringing repetitive motions without a shred of rational basis, and in seeking to resurrect matters long since finally concluded has been at least irresponsible and has come perilously close to an abuse of process.
>
> Lawsuits are expensive and time consuming to courts and litigants alike. When an attorney fails to take an objective look at his case . . . he commits a wrong against the courts and against the parties who must respond to his appeal."

Id. at 101. In that case, the court awarded attorneys' fees and expenses. *See also Kiefel v. Las Vegas Hacienda Inc.*, 404 F.2d 1163, 1167 (7th Cir. 1986) and *Jaquette*, *supra.*

The conduct of plaintiffs' counsel in this case has multiplied the proceedings unconscionably. *Seventy* Motions

were filed by plaintiffs, a fact which in itself ought to be dispositive. But an examination of those prolix, repetitive motions is conclusive of the applicability of § 1927. Matters, such as the scope of discovery, the issuance of foreign subpoenas and the trial setting date were raised two, three and four times. Nothing was ever final; no matter, however frivolous or petty, went without a motion.

Defendants respectfully submit that this case is ripe for application of the deterrents envisioned by § 1927 as well as those arising out of the common law and Rule 11. Certainly, the plaintiffs bear a large responsibility for the conduct of this utterly frivolous litigation and should be compelled to compensate defendants. But plaintiffs' counsel should be forced to acknowledge responsibility as well. All or some portion of the attorneys' fees and expenses assessed against plaintiffs should be payable personally by plaintiffs' counsel.

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COURTROOM MINUTE SHEET—*CIVIL*—CRIMINAL

Filed: March 31, 1986

Case No. 82-950(C) (6) Bastien, et al.

vs.

Rowland & Co., et al.

Judge: Gunn Court Reporter: Lynne Shrum

Attorney( ) for Pltff(s): James Stemmler

Attorney(s) for Deft(s): Michael Clear, et al.
Alan Kohn (was not present)

(✓) Parties present for hearing on: Motions for Summary Judgment

(✓) Court grants Motions for Summary Judgment in favor of Defts. Order to be entered forthwith (G.F.G.)

Attorney present: See Above Deputy Clerk: B. Kramer

Proceeding Commenced: 9.20 a.m. Concluded: 10.00 a.m.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-950C(6)

JACK D. BASTIEN, *et al.*,
Plaintiffs,

v.

R. ROWLAND & CO., INC., *et al.*,
Defendants.

ORDER AND MEMORANDUM

(Filed: March 13, 1986)

IT IS HEREBY ORDERED that the motion of defendants Harold Rand and Harold Rand Public Relations for summary judgment be and is denied.

IT IS FURTHER ORDERED that the motion of defendant Laventhol & Horwath for summary judgment be and is denied.

IT IS FURTHER ORDERED that the motion of defendants R. Rowland & Co., Raymond E. Rowland, Jr. and Robert Rust for summary judgment be and is denied.

IT IS FURTHER ORDERED that the motion of defendants Weiss, Rosenthal, Heller, Schwartzmann, et al. for summary judgment be and is denied.

IT IS FURTHER ORDERED that the motion of defendants Irving Cohen, Stanley Levine, Irving Cohen & Associates, Inc., ICA Productions Corp., Ted Shapiro, and the Astor Group for summary judgment be and is denied.

IT IS FURTHER ORDERED that the motion of these defendants to dismiss Count I of plaintiffs' complaint (RICO) be and is denied.

IT IS FURTHER ORDERED that the motion of these defendants to sever be and is denied.

This case arises out of the sale and purchase of limited partnership interests in a number of motion picture distributorships in 1975-76. Plaintiffs, who invested in five separate limited partnerships organized by defendants Cohen, Shapiro, Preston, Rand and Davis as tax shelters, seek to recover for damages suffered as a result of alleged misrepresentations and omissions by defendants. Plaintiffs seek recovery under Rule 10b-5, promulgated under the Securities and Exchange Act of 1934, common law fraud, conversion and breach of fiduciary duty. In September 1985 plaintiffs amended their complaint to add a count under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* (1985). Also named as defendants in this action are the brokers through whom plaintiffs purchased their interests, the Rowland defendants; the accountants alleged to have reviewed the accounts of the partnerships at issue, Laventhol & Horworth; the attorneys responsible for preparing the offering memoranda in conjunction with the private placement sale of the limited partnership interests, Weiss, Rosenthal, Heller, Schwartzmann, et al.; and the initial limited partner of two of the limited partnerships, Stanley Levine. At the core of plaintiffs' complaint is an allegation of a broad-based conspiracy among the defendants to defraud plaintiffs of their investment through an interlocking system of limited partnerships structured to render a profit to defendants and to circumvent the registration requirements of the Securities Act of 1933.

This case was filed in March 1982 and developed major discovery problems almost immediately. The ensuing four years have been taken up largely in battling over the appropriate scope and order of discovery, a process that, before it was forced to conclusion by order of this Court on February 19, 1986, demanded the attention of four District Court judges, two United States Magistrates and a retired St. Louis Circuit Judge appointed as Special

Master to schedule and supervise depositions. The parties have petitioned the Eighth Circuit for extraordinary relief on three separate occasions. Although the discovery deadline has passed, motions and objections continue to trickle into Court, consuming time and energy of counsel and Court that should now be directed toward trial.

Defendants have now filed motions for summary judgment on plaintiffs' complaint, arguing that after four years of discovery efforts plaintiffs have failed to come forward with any credible evidence in support of their claims. *See Fontenot v. Upjohn Co.*, —— F.2d ——, No. 85-4201, slip op. (5th Cir. Jan. 17, 1986) (summary judgment appropriate where the party bearing the burden of proof fails to produce evidence in support of its claim).

As an initial matter, the Court notes that defendants filed their motions on March 4, 1986, less than two weeks before trial and well past the deadline prescribed by Local Rule 7(H) (dispositive motions not accepted later than 30 days in advance of trial except for good cause shown). Plaintiffs, burdened with trial preparation, have scarcely had an adequate amount of time to respond. For this reasons alone the Court finds denial of defendants' motions appropriate.

Furthermore, the Court finds that genuine issues of material fact remain, making summary judgment an inappropriate remedy in this case, *Buller v. Buechler*, 706 F.2d 844, 846 (8th Cir. 1983). As plaintiffs' case will be tried in its entirety, the allegations of conspiracy among the defendants defeat the arguments of Irving Cohen, et al. in support of severance of actions. Plaintiffs will be provided the opportunity to present their complete case to the jury in a single trial to commence as scheduled seven months ago.

Dated this 13th day of March, 1986.

/s/ George F. Gunn, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 82-950 C

Court No. 6

JACK D. BASTIEN, *et al.*,
Plaintiffs,

v.

R. ROWLAND & CO., INC., *et al.*,
Defendants.

SATISFACTION OF JUDGMENT

Come now the undersigned defendants and hereby acknowledge satisfaction of the judgment for sanctions entered by the United States District Court for the Eastern District of Missouri on August 7, 1987 with respect to plaintiffs Jack D. Bastien, Arthur F. O'Hare, E. Louis Werner, Jr., Michael J. Kickham, Arla E. Reed, and Thomas W. Yager. Satisfaction of judgment is *not* acknowledged as to plaintiffs Burt and Tschudy or plaintiffs' counsel or as to any sanctions, costs or fees which have been or may be awarded by the Court, other than those awarded on August 7, 1987.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached satisfaction of Judgment was mailed to the foregoing attorneys and to Hardy C. Menees, Esq. this 2nd day of March, 1988.

/s/ John I. Alber

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 82-950 C

Court No. 6

JACK D. BASTIEN, *et al.*,
Plaintiffs,

vs.

R. ROWLAND & CO., INC., *et al.*,
Defendants.

AFFIDAVIT

On or about October 11, 1980, I met with Mr. Arthur O'Hare and Jack Bastian. They came to see me regarding the ninety (90) day letter they had received from the Internal Revenue Service. There was approximately two (2) weeks before the end of the ninety (90) day period.

I discussed with them the fact that at the end of the ninety (90) day period they must either pay the money to the Internal Revenue Service or file a protest. They asked me to investigate the possibility of success if they should file a protest within the Internal Revenue Service. They also suggested I talk with certain other investors who apparently also had talked with the law firm of Thompson and Mitchell.

While the clients were in my office on that day, I did talk with a Mr. Donoway who was an investor in the Antares Partnership. He gave me the name of Donald Doerge who had formerly been an officer of R. Rowland & Co., and was presently the successor general partner

for Antares. I was also advised he was still here in St. Louis and working as an officer at another brokerage firm. I contacted Mr. Doerge on the following Monday and also contacted Mr. David Wells. He had the documents of Antares that had been obtained from the general partner, Mr. Rand. David Wells said I could look at the documents if Mr. Donoway gave my approval.

That afternoon, I met with Mr. David Wells and he did permit me to make an examination of the records of the Antares Partnership at his office—I put paper clips in order to xerox copies of a number of documents. This is where I first noticed the cancelled checks, in fact, there were two (2) checks made payable to the Schwartzman law firm, one for $15,000.00, another for $20,000.00.

The next few days I had several conferences with the IRS agent who had been in charge, locally, of the Antares audit. He gave me the name of Bill Falk who was counsel for the District Director. Mr. Falk advised me that Harrowood had already filed a case in the Tax Court and he would send me a copy of the petition. I received from the Internal Revenue a copy of the IRS audit report. I proceeded to research the various elements in connection with the legal issues involved; that the partnership was for profit and the question of separating the limited partners from that of the general partner relating to the issue whether or not there was a profit motive. Mr. Bastian and Mr. O'Hare stated that they were told that there would not be any profits for two or three years and that afterwards there would be profits which would be offset against their depreciation. They were also told that they had a right to investment credit deduction.

I had another conference on October 21, 1980 with the clients—explained to them various problems going to the Tax Court versus paying the assessment and eventually filing a claim for refund and filing suit in the Federal District Court. My associate in the office at that time, Douglas Pedersen, and I worked together on various as-

pects of the research and I had conferences with I think the accountants for several of the investors and we prepared a draft of a memorandum for the conference on October 27, 1980 with the clients. At that point, I was advised that the clients should pay rather than file a protest with the Internal Revenue. It was decided that this would give us an opportunity to see what was occurring in this particular area with the other investors and apparently with other limited partnerships. Our office was authorized to proceed to study the possibility of security violations. Mr. Bastian and Mr. O'Hare had attended a meeting in August, 1980 in which Mr. Donald Doerge had stated that Rowland & Co. did not perform any due diligence before offering the limited partnership interest to the public, that the motion picture did not cost the partnership more than $10,000 or $15,000.

We proceeded to investigate the question of statute of limitations and I had other conferences with the Internal Revenue Service and proceeded with the research of various issues involving the security violations. I had met a Charles Locke, attorney who had advised me he had dealt with abusive and fraudulent tax shelters while in the Internal Revenue Service. He reviewed all the documents we had received from Thompson and Mitchell and documents received from our clients. He advised Mr. Peterson first and then myself that it was a clear case of fraud in his opinion. We had also received names of other limited partnerships and documents thereof from Donald Doerge. This was a key factor in Mr. Locke's analysis. It was also his opinion that the legal opinion of Mr. Schwartzman was inaccurate as to the legal conclusions and did not apply to the individual tax shelters to which the opinion was attached, Statements as to Income Forecasting was contrary to the Rev. Rulings; also, investment credit could not be deducted because there was no United States money used in production of the films.

On November 17, 1980 I had another meeting with Mr. O'Hare and Mr. Bastian and we went over the memoran-

dum we had prepared on possible S.E.C. and fraud litigation. Mr. O'Hare and Mr. Bastian did not wish to proceed unless other investors joined. Mr. O'Hare and Mr. Bastian advised other investors to contact our office.

We decided to set up a meeting with the other investors and I had phone conversation with Donald Doerge. He stated that he would appear at the meeting on December 13, 1980 and he would bring some papers to my office before that time.

I had numerous conferences with Mr. Peterson in connection with the research and preparation of memorandum to be prepared for the December 13, 1980 meeting at the MAC. We did research in connection with the prospectus and the legal issues involved in connection with Reliance-ommissions-fraud on the market place, 10 b-5 violation and Public and Private offerings.

On December 13, 1980 a meeting was held with investors and representatives of the investors at the M.A.C. from 9:00 a.m. to 12:00 p.m. Mr. Doerge explained that R. Rowland & Company did not use due diligence, that the motion pictures only cost anywhere from $10,000.00 to $15,000.00—that the "Brokers Use Only" memorandum were sales gimmick and was used to impress the investors and violated S.E.C. Regulations.

I had a telephone conference on December 16, 1980 with Mr. Donald Doerge—he explained to me the commission arrangement of 10% plus 2½ for due diligence. He stated that the due diligence was never used for due diligence but was used for other purposes for the benefit of R. Rowland & Company. No mention of Commission Rate was set forth in the offering material.

Had meetings and conferences with other investors and also attorneys for other investors. The other investors that I talked with all had the same story—that is, they were sold the investment on the basis that they would

lose money for two or three years but then the motion picture would make some money. They were also told that the film was similar to the movies, Shampoo or French Connection. They were also provided with "For Brokers Use Only" memorandum-several of them did not see the confidential offering material or prospectus until the date they signed or after they had signed and issued their checks.

I had initial contact on the telephone with a Robert Tschudy on December 19, 1980. Continued to have additional conferences with various other investors and with accountants and lawyers for certain other investors.

On January 8, 1981 I had a phone conference with Leonard Vines who agreed to assist me. Also, made some inquiries as to the accounting firm of Laventhol & Horwath.

I continued to have conferences with various other investors and investors representatives, and also had an additional conference with Donald Doerge on January 27, 1981.

Mr. Locke suggested I check on the Panama Canal Corporation since he said this was a familiar device in these connections to have Panama Canal, Nassau, Liechtenstein Corporations as sellers. He also pointed out that the prospectus had a great deal of half truths, partial disclosures. He suggested that the legal opinion should be examined because the legal opinion of Mr. Schwartzman did not clearly reflect a true picture of the application of the Income Forecasting method of depreciation. He also advised that income forecasting was a standard method of depreciation used by abusive tax shelters as well as fraudulent tax shelters. He also advised to check in and obtain a prospectus from a registered motion picture limited partnership to compare as to what the offering material should disclose. He also suggested the economic forecast was omitted in the prospectus and also

omitted was the amount of funds to be paid for promotions, the amount of money to be paid for underwriters, brokers. He suggested also that by applying figures and following through on the distribution agreement and the statements as to the amount of gross income needed to repay the non-recourse note appeared to him not to be correct. It was his opinion that it was worth pursuing, since it appeared to him to be a clear fraud situation.

We continued to develop our memorandums and theories regarding liability of brokers, liability of accountants and attorneys. We used as a basis the case of *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), *Blackie v. Barrach*, 524 F.2d 891, 906-07 (9th Cir. 1975). These cases were important because of the exception to the reliance issue imposed upon investors. Neither Mr. O'Hare or Mr. Bastien and other investors that I had talked with, including Dr. Burt, had actually seen the prospectus prior to the time that they paid their money.

We also reviewed well-known cases such as: *Chris-Craft Industries, Inc. v. Bangor Punta Corp.*, 426 F.2d 569 (2nd Cir. 1970) and *Ernst & Ernst v. Hochfelder*, 96 S. Ct. 1375 (1976). We also used for study purposes the well-known case of *Escott v. Barchris Construction Co.*, 280(d) F. Supp. 643 (S.D.N.Y. 1968). Also reviewed and studied were the two well-known cases cited in law review articles of *Rochez Brothers v. Rhoades I & II*, 491 F.2d 402, 405-06 (3rd Cir. 1974; 522 F.2d 880, 884-5 (3rd Cir. 1975).

We also included in our study the case of *Myzel v. Fields*, 386 F.2d 718 (8th Cir. 1967) and *Nye v. Blyth Eastman Dillon & Co.*, 588 F.2d 1189, (8th Cir. 1978).

Included in our study in connection with the statute of limitations problem we did examine the 8th Circuit case of *Vanderboom v. Sexton*, 422 F.2d 1223, 1240-41 (8th Cir. 1970) as well as *Morris v. Stiefel, Nicolaus & Co.*, 600 F.2nd 138 (8th Cir. 1979).

I had a number of conferences with Donald Doerge in which he stated he had had a number of conferences with a Mr. Frank Johnson who had shared office with R. Richard Davis. Davis was the promoter of the Florida Partnerships of which Antares was one of the limited partnerships. It was Mr. Doerge who also pointed out that there was a group of films purchased from a New York group, Shapiro & Cohen. He advised me that Henry Schwartzman and his law firm were the attorneys for both groups and that Laventhol & Horwath, International Accounting Firm, were the accountants. He provided me with names of other Limited Partnerships and investors.

After David Wells permitted us to examine the documents of the Antares held in his possession, we saw letters by the distributors which placed future income of Antares at a couple of thousand dollars. This lead us into a research area regarding income forecasting and the fact that the K-1's issued by Laventhol & Horwath were taking the total amount of the depreciation based upon the cash value plus the non-recourse notes. The regulations would have prevented it because the forecast for the income for the life of the film was only about $2,000.00. This formed a basis for liability against Laventhol & Horwath as well as the general partners who permitted the accountants to issue the K-1's.

As we were able to observe other offering materials and other audit reports we followed the trail used by the Internal Revenue Service. According to the terms of certain distribution agreements as the income increased, distribution to the partners decreased.

We also made other calculations there which did not seem to fit properly. As other investors like Dr. Burt and Tschudy and Arla Reed signed contracts with us we were able to obtain their documents and this helped verify the fact that this was more than just a single sale of limited partnership interest.

As various documents came into the office one of the interesting facits was that the investors were not advised that the partnership interests were being sold on a nationwide basis.

Upon examination of the law, we concluded that Mr. Locke was correct that the investment tax credit would not apply because apparently the films were made in Europe and there was no United States money invested. As I had my initial phone conversations with Mr. Frank Johnson who lived in Florida, he also verified the films sold were all coming in from Europe.

It was also not disclosed to the investors that the working capitol would be under stated. We had the opportunity to examine the checks in Antares. After Mr. Rand, general partner, paid out all the checks on one day, there was about $1,600.00 left. This was contrary to the statement in the offering material which showed there would be at least $7,500.00 left as working capital. In 1975 and 1976 Mr. Rand was asking the investors to pay additional money to the accountants so that the K-1's could be provided.

We noticed that the actual amounts that the organizers, general partners were receiving from the other partnerships was not stated in the offering material of Antares, nor was it stated in the offering material of Cypress after Dr. Yager came into the office. In examining the offering material of the New York partnerships, it appeared as if they were all essentially the same, all prepared by Mr. Schwartzman's firm. The offering material of New York partnerships also did not state what Shapiro and Cohen received from the other limited partnerships.

We eventually went to Jefferson City and examined the files of the Missouri Security Commission. We found these documents had been filed with them regarding commissions and other matters. The representation made was that the commissions would be 10% and it appeared as if

there were written contracts between the limited partnerships and Rowland. There were also indemnity agreements not mentioned in the offering material. Donald Doerge advised us that Rowland had the exclusive territory here in St. Louis metropolitan area and that another broker had the Kansas City area.

Around January 1982, we obtained a copy of the Delphi Film Asociates which was a limited partnership formed to participate in the production, ownership and explortation of feature length motion pictures. The most publicized picture in the portfolio was "Annie". We compared the information and disclosures in Delphis with the information in the various prospectus from the limited partnerships of our client. We were able to observe a number of matters which were clearly set out in the Delphi and which were not fully disclosed in the client's limited partnership.

a) The selling agents would be reimbursed for time and expenses up to a maximum of $275,000.00. Not disclosed in our matter.

b) Proceeds from the sale of units would be held in escrow and would draw interest and if an insufficient number of subscribers were not obtained, the funds would be returned, together with interest, from escrow agency. Not disclosed in our matter.

c) It also pointed that certain expenditures for advertising and promotion of the films would be borne by the partnership and the intention to borrow funds and the amount of money to be used in connection with the advertising and promotion of the film. Not disclosed fully.

d) The partnership is formed under the New York Uniform Limited Partnership Act and that the limited partner holds as trustee for the money paid to his account. Not disclosed.

e) The selling agent's fee for placing the units would be 8% of the gross proceeds for the sale of units and

would be due and payable upon the admission to the partnership with the limited partnership. Not disclosed.

f) The selling agents could enter into agreements with other broker dealers to offer either for sale on a best effort basis and that each selling agent who participated would be deemed an "underwriter". Not disclosed.

g) The general partner and partnership agreed to indemnify the selling agent and certain other liabilities, including liability arising under the Security Act of 1933 and State Security Law. Not disclosed.

h) The distributor was to be Columbia Pictures and the distribution agreement is completely set out in the prospectus. Only a summary set out.

i) An entire two pages is taken up explaining investment tax credit and the fact that the investment tax credit only applies to that portion of the production cost which qualify as United States production costs. It also clearly sets out that that portion that does not qualify as United States production cost cannot be deducted. Not disclosed.

j) It also points out that investment tax credit could be allocated to a portion to the distributor as well as to the partnership. Not disclosed.

k) It clearly sets out to the investors should consider the state and local tax laws in regards to the investment. Not disclosed.

One of the interesting aspects was the Delphi's extensive information disclosure regarding the *copyright of the films*. No disclosure or mention of copyright of film.

A study of the confidential offering material provided to the investors in this matter showed that the general statements made without specifics regarding the commissions and finders fees to be paid. No disclosures were made as indemnity agreements.

There was no disclosure as to what was going to be done about obtaining the copyright with the partnership. In the documents of Antares, that we received from Thompson & Mitchell, we found the acquisition agreement. The acquisition agreement showed that of the total sales price, $50,000.00 was allocated as the cost for the copyright.

Mr. Johnson indicated to me in our telephone conferences that it was an easy matter for the general partners and organizers to determine the fair market value of the motion pictures as they were imported into the United States. The offering material merely states that the sellers refuse to disclose what they paid for the film. That a value had to be place upon each film as they entered the United States. He stated that Henry Schwartzman was an expert and knew about this. Mr. Davis had told him that Mr. Schwartzman told him not to worry about that as no one would ever think of looking at the import valuations placed upon the films. Also, Mr. Johnson stated, that the records would show that no insurance was ever put on any of these films.

In my conversations in 1982 with the Internal Revenue Service and the attorneys representing the Internal Revenue Service in preparation of their trial of the Deegan case, I mentioned the fact that copyrights may not have been obtained. I pointed out to them what I had been told about the value placed on the films when imported and that apparently no one checked that, and the fact that these films had not had any insurance. It is interesting to note that in the Deegan case, the Tax Court's opinion, makes reference that the promoter, Shapiro/Cohen, never did obtain copyrights, never did check the import papers to determine what the fair market value placed upon films, and they never insured the films. This formed a basis and foundation for ruling that Shapiro never attempted to promote the motion pictures.

Mr. Frank Johnson discussed with me how Henry Schwartzman actually determined the amount of cash to

be set forth in the offering material as cash down payment. He then added on the non-recourse note so that the proposed deduction by the investors would be in access to $1,000,000.00 to $2,000.000.00.

In my conversations with Dr. Burt, I found out that he was not shown the offering material or prospectuses before he paid his money. He was shown a letter written by Cohen to James Wilcox which summarized the offering material and he was shown the appraisal of the motion picture.

Arla Reed's recollection was that he was shown the appraisal which showed the stars and the name of the motion picture and he may have been shown "Not For Brokers Use" memorandum prepared by Rowland, but he did not see the offering material or read it prior to the time he issued his first check.

When Dr. Yager came in the office, he did state that he was given the offering material ahead of time and turned it over to his attorney. Dr. Yager personally, I don't believe, actually studied the offering material accept in a very casual basis. When Mike Kickham came to the office, he had obtained the offering material ahead of time and had turned it over to his accountant at that time. Mr. Kickham advised me that he had discharged his accountant because he found out that the accountant had received a kickback from Rowland & Co.. He also had seen the "For Brokers Use Only" memorandum that the broker had given him to xerox.

When Mr. Lou Werner came into the office, he stated that he received the "Brokers Use Only" memorandums on the first motion picture. He received the offering material after he paid his money. The second motion picture he received a call from James Wilcox while he was in Greenbriar, South Carolina, during a convention. He believes that one of Shapiro's representatives flew down to Greenbriar and brought the papers which he signed

and he gave them a check when he invested in the second limited partnership. He thinks the prospectuses was either given to him personally at a later date or was mailed to him.

We had meetings in April, 1982 and in May, 1982 with all the investors. We went over the various elements of the case, including the possible problem of statute of limitations, fraud on the marketplace, 10 b-5, and fraud. It was explained to the investors that they could not collect punitive damages on a security violation and that they could only recover punitive damages on the fraud count. It was explained to the investors on several occasions that I personally didn't think the case has much money from an actual damage standpoint. The case would only be worth it if there was a substantial punitive damage recovery.

In May of 1982, we had a meeting with all the investors and gave each of them a proposed draft of the proposed complaint. I went over the entire complaint with the investors to point out their individual claims and the damages. We had obtained an estimate of the damages from their own individual accountants. I explained to them that later we'd have to have expert witnesses brought in who may be able to develop different and additional damages, especially as to loss of profits and tracing the funds into the hands of defendants and the profits they made off of the funds. I again emphasized that the case did not have a great deal of damages considering the expense that would be incurred, except for the punitive damages.

It was my opinion by April and May of 1982, that we had a sufficient document evidence along with the testimony of Donald Doerge and Frank Johnson, in my opinion, to show a conspiracy to evade the security requirements of registering as a public offering and fraud. We had reviewed and prepared an internal memorandum regarding the question of whether or not the partnerships,

although formed at different times, could be considered as one integrated offering. We reviewed S.E.C. Release 4552 of November 6, 1962, and the various cases which cited and used that release as a basis to consider whether or not separate offerings should be considered as one integrated offering. We also had at our disposal the well-known case of *Securities and Exchange Commission v. Ralston Purina Co.*, 346 U.S. 119, 126, 73 S. Ct. 981, 97 L. Ed. 1494 (1953).

We also were able to obtain from the I.R.S. a copy of interrogatories used by the Internal Revenue Service directed to the partnerships and general partners and organizers. We were able to adapt most of the requests for documents into our subsequent motions for inspection of documents and interrogatories.

Mr. Frank Johnson had advised me that Davis never had more than two or three prints of any of the films. It would be impossible to obtain any kind of a gross with only two or three prints. He stated generally that to have any kind of a gross you would need anywhere from one to three hundred prints back in 1975 and 1976 in order to obtain any kind of gross income to recup the cost of $1,500,000.00, $2,000,000.00 or $3,000,000.00.

Prior to the time we filed suit, I also had an opportunity to talk with Mr. James Wilcox who is now living in California, and was working for a brokerage firm. Mr. Doerge had given me his phone number. He advised that he was selling real estate tax shelters. He advised me that he did take a trip to Florida on one occasion and he made at least one trip to New York. He may have made two trips to New York, but he could not recall exactly. His primary contact was Henry Schwartzman. When anything came up, he would contact Henry Schwartzman. He was advised and it became known in business that Henry Schwartzman was considered the genius behind motion picture tax shelters. Mr. Wilcox said he had some question regarding the prospectuses and the question

of disclosure, but Henry Schwartzman had assured him that everything was absolutely correct and that no one would be successful in attacking the prospectuses. Mr. Wilcox said he had talked with John Short over at Peper, Martin's law firm. John Short, he recalled, raised some question as to whether or not the offering material gave full disclosure. There was also a question in Mr. Wilcox' mind about using the "For Broker Use Only" documents, but Mr. Rust insisted that this was the quickest and best way to sell the partnership interest. Mr. Wilcox, in one of our phone conversations, stated he never did inquire about the copyrights and, as far as he could remember, he never thought about asking about copyrights nor did the subject ever come up. I asked him if he ever checked out the calculations to check their veracity as to the anticipated amount of money that would be needed to pay off the notes. He stated that he did not.

I took the distribution agreements from Antares and subsequently with the other partnerships and made calculations by using hypothetical figures to determine how much gross income would be required in order to pay off and have a profit. I used the assumptions that were provided to Mr. Bastien which were given to him by his broker. There were four different assumptions based upon different types of gross income and used the distribution agreements set out in the Antares offering material. My recollection is that I also made these same calculations with Alpine or Somerset. I wanted a comparison between the Davis partnership and the Cohen-Shapiro partnerships. In both cases the amount of gross income set out in the offering materal would not generate sufficient reveneus to cover the purchase price of the film as set out in the offering material. In my conference with the various investors individually and in our joint meetings in April and May of 1982 I brought these matters to the attention of the investors.

THE RICO COUNT

Sometime in 1982 and 1983 there were reported cases, mostly on appeal from the District Courts, involving the Racketeering Influence Corrupt Organization Act. There was literature coming out of the American Bar Litigation Section and a few Law Review articles were being written regarding the civil application of said act. Even though the act had been in effect about ten years it was considered primarily a criminal statute. Information came out about a case in the Eighth Circuit called *Bennett v. Berg.* Initially the Court of Appeals issued its opinion but then there was a rehearing and another opinion was rendered by the Eighth Circuit. Approximately the same time the American Bar Litigation Section was having a convention in two areas of the country. One program was being held in New York and the other in Los Angeles. This was in November of 1983. I was making arrangements to go out to Los Angeles to meet with Mr. James Wilcox and also to talk with two and maybe three potential expert witnesses in the motion picture business. Their names had been given to me by the I.R.S. attorneys handling the Deegan case out of New York. I also obtained names from several other sources.

I attended the session dealing with RICO and its civil application up to that time in Los Angeles. I also attended a session dealing with the control of documents, methods of marking and controlling the source of documents and the use of computers in cataloguing documents.

I also attempted to have a person contact with Mr. Wilcox. This was the first time I notice a hesistancy on his part to talk with me. He also had numerous excuses for not meeting with me. I never did meet with him.

I met with two potential expert witnesses who were familiar with limited partnerships and their application during the 1974, 1975, 1976 period. One was at the University of Southern California and the other one was at the University of California at Los Angeles. Both gentle-

men reviewed my pleadings and certain documents which I had brought with me. They both suggested that it was important that discovery be completed before they would be in a position to examine the file and give the necessary opinions. They provided certain information as to the type of documents I should ask for and the type of questions to be asked on interrogatories and depositions. They also gave me the names of several people who might be qualified to discuss the security aspects of the limited partnership private placement format and what should be disclosed in the offering material.

When I came back from the convention we were in the midst of a great deal offfi briefing and motions before Judge Noce in connection with the various discovery matters. It was not until after Jan. 26, 1984 that I was able to commence work on amending the pleading. Mr. Leonard Vines, Mr. Stemmler and I attempted to digest some of the material I had brought back from the convention in order to determine the proper language to be utilized in pleading a RICO claim. In my discussion with attorneys at the Seminar in Los Angeles, there was a consensus that I may have a classic case of "Pattern of Racketeering", separate and distinct "enterprise". I finally decided upon the "predicate acts" of security fraud and mail fraud.

In October, 1984, I again attended the American Bar Litigation Section on RICO, held in New York. One of the attorneys for Defendant Shapiro was on the panel. He advised other members of the panel that I was in attendance. I subsequently met at breakfast with Mr. Robert Blakley He was the author of the act while acting as counsel for the Senate Committee. He was helpful in suggesting a line of discovery. He also was of the opinion that the large number of partnerships formed so closely together could well fit the "Pattern of Racketeering".

On October 10, 1985, I attended the ALI-ABA Video Law Review "Civil RICO Litigation After Sedima". This

was a national video seminar via satellite to thirty-seven cities. I attended in St. Louis. Based upon my investigation, factually and legally, I was convinced that we had a RICO.

SETTLEMENT DISCUSSION

On or about February 7, 1986, during deposition in St. Louis, Attorney Michael Clear handed Jim Stemmler a note indicating a settlement offer. The total sum was $110,000.00 with Defendant Cohen not agreeing to settle. He wanted to proceed with his counterclaim.

A meeting was held with seven of the clients on February 13, 1986. Mr. Bastian was not available. Immediately, the Plaintiffs objected to condition that Defendant Cohen would not be part of the settlement. They would only discuss settlement on the following conditions:

1) Cohen would execute release and entire case over-with as to all parties.

2) Defendants pay Court costs.

3) Sanctions as to attorney fees directed against Plaintiff be dismissed.

4) They would pay proportionate cost of Special Commissioner. I communicated this to Judge Bloom, the Special Commissioner. Later, I spoke with Judy Ryker, John Horgan and the attorney representing Defendant Shapiro and communicated the conditions. They could not make that decision at that time.

I received a call on February 17, 1986 from John Horgan. He told me that if agreement could be reached as to Defendants paying Court costs (if we could reach a definition of costs); the sanction against Plaintiff are eliminated, agreement made to share costs of Special Commissioner and Cohen and Preston would dismiss counterclaim and case dismissed, would the Plaintiff accept $165,000.00.

I spoke with Mike Kickham and suggested he call L. Werner. I also spoke with Dr. Burt and Arla Reed.

Mr. Kickham called back and I confirmed that Mrs. Werner had called and stated that she doubted if her husband would accept the offer. Mr. Kickham stated he would settle by himself, if he believed he could come out OK. I suggested he talk to his personal attorney, Mr. Padberg. He said he had a call into him. Dr. Burt and Mr. Reed rejected the offer.

I then called Judy Ryker and asked if one Plaintiff wished to settle would that be possible. She said they would have to take this up with the others.

On February 17, 1986, I had a conference call with all the Defendants in California. James Stemmler and Judge Bloom were present. I discussed the meeting of February 13, 1986 with the clients and the conditions they imposed. I was told that Defendants would not settle with one or two Plaintiffs. They wanted the entire case settled, just as we wanted the entire case settled.

I was told the communicate the following offer:

1) Defendants would pay Court costs, i.e. filing fee, original cost of deposition and subpoena.

2) Cohen and Preston would dismiss their counterclaim and sign release.

3) Sanctions against Plaintiff would be forgiven.

4) Plaintiffs pays ½ of Special Commissioner and Defendants pay ½ of Special Commissioner.

5) Defendants, except Cohen, would pay $165,000.00.

A meeting with scheduled on Sunday, February 23, 1986. Mr. Kickham and Mr. Werner could not attend. Mr. Werner had been advised of the proposed settlement and rejected the proposal. He stated to me it was alright for the other Plaintiffs to settle, he would continue the case with Mr. Stemmler.

On February 21, 1986, I wrote each client setting forth the details of said offer, (see Exhibit A attached hereto). I also sent a copy of Mr. Kickham's request for an analysis of the case (see Exhibit B).

Mr. Stemmler communicated the offer of settlement at the February 23, 1986 meeting. He also pointed out to the Plaintiffs that the Defendants stated they would not settle with one Plaintiff. They wanted to complete settlement just as Plaintiffs wanted to complete settlement.

I also advised the Plaintiffs that Mr. Kickham was in favor of settling at $165,000.00. Mr. Stemmler recommended settling at $165,000.00 with the conditions as agreed to by the Defendants with Court costs and payment of the Special Commissioner.

This was rejected by the Plaintiffs present. Mr. Stemmler then suggested that a counter offer of $200,000.00 to $250,000.00 be made. This was rejected by the Plaintiffs.

Mr. Stemmler did bring to their attention that Defendants had threatened to sue the Plaintiffs if they lost the case.

The Parties directed us to submit a counter offer of $500,000.00. They did accept the ancillary conditions as to the Court costs and payment of ½ of costs of Special Commissioner.

I sent a letter to the Defendants on February 24, 1986 (see Exhibit C) and made a counter offer of $500,000.00. On March 4, 1986, after several inquiries from Plaintiffs, I sent a letter to the Plaintiffs setting out the $500,000.00 counter offer and gave my opinion that it had been rejected since Defendants had filed their Motion for Summary Judgment (see Exhibit D). I also requested they pay up the $25,000.00 expense fund they had agreed upon previously. Since we had to proceed with the trial. All of the Plaintiffs paid their share of the money. Mr. Kickham had been excused by the other Plaintiffs from

paying into this fund and the other Plaintiffs increased their proportionate share of this fund.

During the trial, it is my recollection that Dr. Burt, on at least two occasions; Mr. Bastian, once, Mr. O'Hare and Mr. Kickham (at least once each), called. They each inquired about the conduct of the trial but said nothing about settlement.

ADDITIONAL COUNSEL

Mr. Leonard Vines and James Stemmler were both assisting me in 1983, 1984, and part of 1985. Mr. Vines, because of his new partnership arrangements could not assist after July 31, 1985. I spoke with Carroll Donahue. He reviewed the file and had a general discussion with me. He had conferences with his firm. He advised me, sometime near the end of August or early September, 1985, that the decision was they could not assist. They felt that the delay in the Court not signing the order reflecting the July 31, 1985 meeting, and the immediate opposition of Defendants to the request to produce documents from five additional partnerships would prevent adequate time to complete decision. It would take too much resources onsidering that the matter was on a contingent fee basis.

I then contacted Jack Taylor of Lewis Rice. I was later informed that the discovery period was too short, the Defendants would probably cause further delay. It would take too much resource to complete the discovery considering the fact it was on a contingent fee basis.

I then contacted Suelthaus, Kaplan, Cunningham, Yates, Fitzsimmons & Wright firm. The firm reviewed certain aspects of the file but concluded that there was not sufficient time to complete discovery. This was already in the middle of October.

I then spoke with a John Davidson. He appeared at the November 26, 1985 hearing. He made a review of the

file. I met with him again on the morning of December 18, 1985. He later wrote me stating he could only participate upon a fee arrangement which would be decided by the Bar Association sometime in the future. I received his letter after I had been discharged from the hospital. I could not agree to this arrangement.

Based upon my investigation, research and statement of clients, the Plaintiff's had a meritorious claim under RICO, Security Fraud, Fraud, Conversion, and Breach of Fiduciary Relationship.

/s/ David G. Lupo

STATE OF MISSOURI)
) ss
CITY OF ST. LOUIS)

COMES NOW David G. Lupo, who, under oath and before me appeared in person and stated that the above facts are true to the best of his knowledge, information and belief.

Subscribed and sworn to before me this 29th day of July, 1987.

/s/ [Illegible]
Notary Public

CERTIFICATE OF SERVICE

I hereby certify that a complete copy of this instrument was hand delivered to the attorneys of record in court to each of the following parties this 30th day of July, 1987.

/s/ Robert T. Ebert

Mr. John J. Horgan
MOSER, MARSALEK, CARPENTER, CLEARY, JAECKEL & KEANEY
314 N. Broadway, Suite 360
St. Louis, Missouri 63102

Mr. John Michael Clear
Mr. John I. Alber
BRYAN, CAVE, MCPHEETERS & MCROBERTS
500 North Broadway, Suite 2200
St. Louis, Missouri 63102

Mr. Stefan J. Glynias
Mr. Thomas K. Lammert
EVANS & DIXON
314 North Broadway
St. Louis, Missouri 63102

Mr. George R. Kucik
Mr. David Dekker
ARENT, FOX, KINTNER, PLOTKIN & KAHN
Washington Square
1050 Connecticut Ave. N.W.
Washington, D.C. 20036-5339

Mr. Richard W. A. Davis
individually and as trustee
for Richard W. A. Davis, Inc.
a dissolved Florida Corporation
310 Cordova Road
West Palm Beach, FL 33401

Mr. Alan C. Kohn
Mr. Robert Useted
KOHN, SHANES, ELBERT, GIANOULAKIS & GILJUM
411 N. 7th St., Suite 1215
St. Louis, Missouri 63101

Mr. Harry O. Moline
Ms. Sherri L. Cranmore
MOLINE, TEGETHOFF, OTTSEN, MAUZE, LEGGAT & SHOSTAK
11 S. Meramec, Suite 1010
St. Louis, Missouri 63105

Ms. Susan G. Rosenthal
WINICH & RICH, P.C.
919 Third Avenue
New York, NY 10022

Mr. Edward L. Dowd, Jr.
DOWD & DOWD, P.C.
314 N. Broadway, Suite 1910
St. Louis, MO 63101

Mr. Joel Preston
215 Peck Drive
Beverly Hills, CA 90212

Joseph and Carol Wohl
22 Grove Street
Wayland, MA 01778

Mr. David Weiss
644 Lenox Avenue
Westfield, NJ 07090

Thomas M. Burke
NOONAN & BURKE
906 Olive St.
St. Louis, MO 63101

Frank N. Gundlach
ARMSTRONG, TEASDALE, KRAMER,
VAUGHAN & SCHLAFLY
611 Olive St., Suite 1900
St. Louis, MO 63101

James Leonard
PADBERG, MCSWEENEY, SLATER
& MERZ, P.C.
1075 Locust St.
St. Louis, MO 63101

Mr. E. Lewis Werner, Jr.
6900 East Camelback Road,
Suite 700
Scottsdale, Arizona 85251

EXHIBIT A

LUPO & STEMMLER
Attorneys and Counselors
1240 Paul Brown Building
818 Olive Street
St. Louis, Missouri 63101

314-436-4130

David G. Lupo, P.C.
James A. Stemmler

George L. Stemmler
(1895-1978)

Springfield Baldwin

February 21, 1986

To All Clients:

Re: File 2401
Bastien v. Rowland

Dear Mrs. Tschudy and Gentlemen:

Following the completion of the depositions in California, I received a conference call from California from all the Defendants, Mr. Stemmler and the Special Commissioner.

The Defendants asked this question:

Assuming the following:

1. Cohen and Preston will drop their counterclaim and all Defendants will give releases to Plaintiffs and Plaintiffs will give releases to all Defendants.

2. That Defendants will pay Court costs as defined herein:

a) The filing fee and asundry costs assessed by the Court.

b) The original copies of all depositions taken (approximately $6,000.00).

c) Defendants will drop sanctions against all the Plaintiffs which is now on appeal to the U.S. Court of Appeals (approximately $2,900.00).

d) Defendants will pay one-half of the costs of the Special Commissioner which is now against the Plaintiffs' attorneys and which is now on appeal to the U.S. Court of Appeals if the Plaintiffs will pay the other one-half. (The Special Commissioner estimated his expenses were approximately $12,000.00).

With those assumptions, will Plaintiffs accept $165,000.00 in settlement?

We had requested the Defendants to pay all Court costs. This could include another $12,000.00 or more, depending whether the Court would let us assess part or all of the cost of the "expert witnesses."

We had also requested that Defendants, who had requested the Special Commissioner, pay all of his costs.

As you have all been advised at the meeting of February 13, 1986, (except Jack Bastien) you have invested, out of pocket, an amount as of January 1986, of approximately *$197,000.00*. The February bill, still unpaid, came to over $10,500.00.

I stated to you at the meeting that my best estimate was that you would have to invest another $50,000.00 to bring this case to trial. The Trust fund had to be used to pay the urgent bills and the balance is now just over $5,000.00. This special fund had to be used primarily because certain clients are so late in paying the monthly bills.

We have not yet received the bills for all the depositions taken in New York and California. Mr. Stemmler is in Washington, D.C. taking the deposition of the Copyright office.

We have several thousand dollars of bills not yet billed out, for the depositions taken the two weeks before the New York depositions.

We have not received the airplaine fares or hotel costs for Mr. Stemmler and Mr. Bakula, nor the Federal Express bills for shiping the several thousand documents to New York and California to be used in the depositions.

As pointed out at the meeting, each person subpoenaed must be presented with a check for the distance from their residence to St. Louis, paid at 20 1/2 cents per mile plus $30.00 attendance fee. Since most of the witnesses are in New York and California, you can estimate that around $20,000.00 will be spent to bring in witnesses.

We have not received the latest charges from our two experts, Mr. Farnsworth and Mr. Mitchell. We have requested the Court to permit us to retain other experts, such as Security experts, Tax Shelter experts and Motion Picture experts.

Mr. Kickham has written us a letter, which, in effect, seeks an evaluation of the case. We are enclosing a copy for everyone since all clients have the same right to information as one client.

I am not in the position to respond since I have not participated in the discovery since December 18, 1986. As a result of the incident on that date I do not even have a recollection of a great number of events occuring for some weeks prior thereto.

We are scheduling a meeting with the clients on Sunday, February 23, 1986 at 2:00 P.M. at our offices.

Mr. Stemmler, who has been actively involved with all the discovery will attempt to respond to Mr. Kickham's questions and any other questions any of you may have.

You should either accept the Defendants' offer, reject it, or make a firm counteroffer.

Very truly yours,

/s/ David G. Lupo
DAVID G. LUPO

DGL:kk

Enclosure

365 Conway Gardens Court
Creve Coeur, Missouri 63141
February 13, 1986

Lupo & Stemmler
Attorneys and Counselors
1240 Paul Brown Building
818 Olive Street
St. Louis, Missouri 63101

Attention: Mr. David Lupo

Gentlemen:

Persuant of our conversations of February 17, 1986. Dvid, I find myself, after considering the proposed settlement by the defendant's attorneys, somewhat at a loss as to how to reach a conclusion as to whether such proposed settlement would be to my best advantage at this time.

So many things that you have alluded to, both today and in previous phone conversations and at our meeting at the Missouri Athletic Club last week, leave me unable to reach a valid conclusion without more information. Therefore, I am asking that you spell out in writing the full particulars of any proposed settlements.

Such particulars, of course, should include the amount; the gross receipt of me, plus any expenses that I would be liable for (such as the various and sundry charges that you list under the Tax Shelter Litigation Fund Account and bill us for periodically); the cost of the special master and of course, any other items that would potentially put me at risk were I to make a settlement based on a verbal offer.

I would also like to know the extent and the amount of the sanctions that have been placed against either myself or other defendants or the attorneys and how this would effect the settlement, if any, keeping in mind that

if these sanctions are dismissed it really increases your share of the return and not ours.

I would also like to know of any exposures, both monetary and legal, that I may be subject to as a result of any proposed settlement and your best recommendation as the attorney for the plaintiffs based on your knowledge of our position to go before a jury at the appointed time of trial.

Like everyone else, it hs always been my intention to maximize my return and minimize my risk. I think that we all agree that that is a time honored goal

Thank you for your prompt attention, I remain

Very truly yours,

/s/ Michael F. Kickham
MICHAEL F. KICKHAM

MFK/ajm

EXHIBIT C

LUPO & STEMMLER
Attorneys and Counselors
1240 Paul Brown Building
818 Olive Street
St. Louis, Missouri 63101

314-436-4130

David G. Lupo, P.C.
James A. Stemmler

George L. Stemmler
(1895-1978)

Springfield Baldwin

February 24, 1986

Mr. John J. Horgan
Moser, Marsalek, Carpenter,
Cleary, Jaeckel & Keaney
314 N. Broadway, Suite 360
St. Louis, Missouri 63102

Re: File 2401
Bastien v. Rowland

Dear Mr. Horgan:

The settlement proposal by the Defendants has been partially rejected.

The sum of $165,000 is not satisfactory.

The Plaintiffs have authorized us to submit a counter-proposal of $500,000.00 for settlement if agreed upon by Monday, March 3, 1986. The four collateral matters are acceptable.

Very truly yours,

/s/ David G. Lupo
DAVID G. LUPO

DGL:kl

cc Defendant Attorneys

EXHIBIT D

LUPO & STEMMLER
Attorneys and Counselors
1240 Paul Brown Building
818 Olive Street
St. Louis, Missouri 63101

314-436-4130

David G. Lupo, P.C.
James A. Stemmler

George L. Stemmler
(1895-1978)

Bradley J. Bakula
Springfield Baldwin

March 4, 1986

To All Investors

Re: File No. 2401

Your offer to settle for $500,000.00 and the other collateral matters, i.e. court costs, etc., were communicated to the Defendants on Monday, February 24, 1986. They were given until Monday, March 3, 1986 to respond.

Defendants have not responded directly but have filed motions to dismiss and request for summary judgement. I can only assume they have rejected your offer.

Preparations are being made for trial. Under our rule we must submit to the Court by March 7, 1986, the list of all documents we intend to offer in evidence, the names of all witnesses each document must be marked as an exhibit, etc. Also, all portions of each deposition of each defendant must be submitted.

We must issue subpoenas for the witnesses in St. Louis and those out of state. Accompanying each subpoena must

be a check for $30.00 plus .20½ cents per mile from the residence to the Courthouse.

Several of you had not paid the statement sent in February. We have thousands of dollars outstanding for all the depositions taken in St. Louis, New York, Los Angeles and Washington, D.C.

The monthly statement for February will be out in the next few days. However, we need $25,000.00 immediately to pay for the subpoenas and other costs to prepare for trial.

We do not believe that as attorneys we should be the watchdogs as to who is or is not paying their portions of the expenses.

Please send your portion of the $25,000.00 immediately in accordance with the schedule attached hereto. Since Mr. Kickham will continue to pay his monthly obligations, the balance of you will have to make up the *$25,000.00* special fund.

We expect all Plaintiffs to be in Court on March 17, 1986. That first week is important. The jury will be selected and will be observing all of you for the first time. That week should be kept open so that most of your time will be in Court.

Your immediate attention will be appreciated.

Very truly yours,

/s/ David G. Lupo
DAVID G. LUPO

DGL:rb

Schedule

	$25,000.00	
Mr. Werner	48%	12,000.00
Dr. Burt	13%	3,250.00
Mr. Reed	13%	3,250.00
Dr. Yaeger	8%	2,000.00
Mr. Bastien	6%	1,500.00
Mr. O'Hare	6%	1,500.00
Mrs. Tschudy	6%	1,500.00

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Cause No. 90-1422-EM

IRVING COHEN,
Plaintiff-Appellant,

vs.

DAVID G. LUPO, *et al.*,
Defendants-Appellees.

APPELLEES' PETITION FOR REHEARING EN BANC

Come now Appellees David Lupo and James Stemmler, by and through their counsel of record, and hereby petition this Court fora rehearing en banc of the issues raised in Appeal Number 90-1422-EM and decided by the three-judge panel. In support of their Petition for Rehearing En Banc, and as grounds therefore, Appellees state to this Honorable Court as follows:

1. The panel's opinion conflicts with substantial authority from the U.S. Supreme Court, Eighth Circuit precedents, and Missouri law in concluding that Appellant Irving Cohen's successful Rule 11 application did not present the same claim as his present malicious prosecution action for res judicata purposes. The opinion issued by the panel elevates form over substance without regard to the fact that long-standing Missouri case law—which governs this diversity of citizenship action—dictates the application of the "transactional approach" or test adopted by the Restatement of Judgments, 2d. See *Grue v. Hens-*

ley, 210 S.W.2d 7 (Mo. 1948), and *Brown v. St. Louis Police Department*, 691 F.2d 393 (8th Cir. 1982). Nowhere does the panel confront this fact.

Further, *Nevada vs. U.S.*, 463 U.S. 110 (1983), *Lane v. Peterson*, 899 F.2d 737 (8th Cir. 1990), and *Ruple v. City of Vermillion, South Dakota*, 714 F.2d 860 (8th Cir. 1983), cert. denied, 455 U.S. 1029 (1984) clearly stand for the proposition advanced by Appellees herein—that under the transactional approach Cohen's claim for recovery against all of the Appellants was fully and fairly litigated in the Rule 11 proceedings in a forum chosen by Cohen himself, so that Cohen should not now be given a second "bite at the apple". As stated in *Lane*, *supra* at 744:

> Different substantive law and new legal theories [do] not preclude the operation of res judicata. One of the merits of this Restatement (Second)'s approach is that it prevents parties from suing on a claim that is in essence the same as a previously litigated claim but is dressed up to look different. Thus, where a plaintiff fashions a new theory of recovery or cites a new body of law that was arguably violated by defendant's conduct, res judicata will still bar the second claim if it is based on the same nucleus of operative facts as the prior claim.

Cohen sought the same relief in both of his actions, and it cannot be denied that both actions arose out of the "same nucleus of operative facts"—the conduct by the Appellees in the underlying *Bastien* litigation. Nowhere does the panel confront this fact.

Appellees submit that the application of the "transtional test" can only result in the barring of Cohen's subsequent action for malicious prosecution. The claims both sought compensation for the full amount of Cohen's alleged losses from the Appellees' conduct of the *Bastien* litigation. Appellees assert that their exposure to this

vexatious relitigation of Cohen's claim deprives them of their Due Process rights under the United States Constitution.

2. The panel erred in relying on the differences in the nature, elements and potential remedies between Rule 11 and malicious prosecution in reversing the District Court. Cohen employed these slightly different vehicles successively to assert twice what really is only one claim against the Appellants. The panel simply fails to recognize the very purpose of the transactional approach dictated by Missouri law and adopted by this Circuit as well—to abandon relience upon the different labels given to traditional "causes of action" and their technical differences in favor of an approach which relies upon examination of the underlying *cause for action*—the factual basis of the claim. See *Lane, supra*; *Ruple, supra*; and *Grue, supra.*

The panel's opinion cites the Rules Enabling Act in an attempt to draw a bright line between the "procedural tool" of Rule 11 and the "substantive right" of malicious prosecution. Ending this sort of convenient labelling and pigeonholing was the goal of transactional approach—to avoid giving a litigant more than one "bite at the apple." As this Court stated in *Ruple*, "there is no reason to give a claimant more than one fair chance to present the substance of his or her case." *Id.*

Plainly put. the panel's opinion elevates form over substance in clear contravention of existing law in Missouri and this Circuit. Under the logic of the instant opinion, Cohen and other litigants will get *three* "bites at the apple." They would pursue compensation for fees and costs by way of sanctions (Rule 11 and other sanctions remedies), a Rule 54 cost application *and* a malicious prosecution action—a result that flies in the face of the transactional approach and the equitable principles underpinning the doctrines of res judicata, election of remedies and collateral estoppel. The result: many judg-

ments in federal court will be followed by these three proceedings, all of which involve the same factual predicate and which will multiply federal litigation unconscionably. The federal bench has already seen the drastic proliferation of Rule 11 applications, and appeals therefrom, since the 1983 amendments to the Rule. The panel's opinion, if upheld, will certainly worsen that trend.

3. The panel erred in relying on the dichotomy between substantive rights versus procedural rules in finding that Cohen's Rule 11 application did not present the same claim he now asserts. The relationship between Rule 11 and a "substantive cause of action" cannot be defined by such a bright line test. No federal rule so mimmicks a recognized and traditional "cause of action or theory of recovery as Rule 11 mimmicks malicious prosecution. The Rules Committee intentionally afforded the district courts with broad discretion to apply Rule 11 sanctions. Clearly this left the field wide open for Rule 11 orders for the full amount of compensatory and punitive damages available in malicious prosecution, but litigated in a summary proceeding before a knowledgeable and expert arbiter—the trial judge who witnessed the allegedly violative conduct. Appellant afforded himself of this opportunity, and presented the entirety of the conduct of Appellees in the *Bastien* litigation to support his Rule 11 claim—a claim that was co-extensive (under the "nucleus of operative fact" test) with the one he now reasserts under the moniker of "malicious prosecution." See *Lane, supra.*

In these circumstances, the transactional test, rather than a vague proscription in the Rules Enabling Act, should be the determinant of the identity of claims for res judicata purposes. It is clear that the panel's opinion reverts to outdated definitions of the terms "cause of action," "substantive right," and "procedural tool" and salvages Cohen another chance to complete his recovery. In fact, the amount of the Rule 11 sanctions imposed is irrelevant to the issue of whether Cohen had a full and

fair chance to present his claim in the Rule 11 proceedings. The result sacrifices due process to the Appellees and the principle that a litigant only gets one fair chance to present his claim.

4. The Court erred in concluding that the "sum and substance" of malicious prosecution (probable cause, malice, and the amount of damages suffered as a result of the conduct) are irrelevant to Rule 11 analysis. To the extent that they are alleged by a Rule 11 applicant, they are more than relevant—perhaps critical—to the proper consideration of the sanctions issue. What is irrelevant are the differences in the nature, elements and potential remedies between Rule 11 and the cause of action for malicious prosecution, cited in the panel's opinion.

5. Language in the panel's opinion demonstrates error or misunderstanding by the panel of the factual background and the law. In its opinion, the Court states:

> The nucleus of operative fact necessary to maintain an action for malicious prosecution includes the conclusion of the underlying action.

In fact, conclusion of the underlying action is an element of malicious prosecution—it has nothing whatsoever to do with the "nucleus of operative facts" which must be compared in two claims under the transactional (Restatement 2d) approach to res judicata analysis.

Later the panel's opinion states:

> Whether Cohen would be victorious in the *Bastien* litigation could not have been determined until the conclusion of that case.

Appellees urge that this statement, in its intended context, indicates that the panel was unaware that, at the time of the Rule 11 proceedings in the District Court, the underlying *Bastien* litigation had already been concluded. Cohen knew the outcome, and made an election

to proceed with his Rule 11 motion, rather than an action for malicious prosecution Cohen elected his remedy and pursued it to final judgment. Now, disappointed with the outcome (Rule 11 sanctions of "only" $100,000), Cohen attempts to put Appellees under the sword a second time on this same claim, bearing a different label. See *Lane, supra.*

6. The panel overlooked, misapprehended or erred in determining this case without commenting upon numerous critical issues raised in Appellees' Brief, to wit: the fact that the doctrine of election of remedies also bars Cohen's malicious prosecution claim; the fact that Rule 11 does not abridge or modify Cohen's right to a malicious prosecution action, but merely presented him with a choice of remedies; and the voluminous authority throughout the various Circuits for the proposition that technical differences in remedies are not enough to shield a claimant from the effect of res judicata so long as the transactional approach demonstrates an identity of claims. (See Appellees' Brief.)

7. The undersigned counsel express their belief, based on a reasoned and studied professional judgment, that the decision of the panel is contrary to the following decisions of the United States Supreme Court and United States Court of Appeals for the Eighth Circuit, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court: *Nevada v. U.S.*, 463 U.S. 110 (1983); *Ruple v. City of Vermillion, South Dakota*, 714 F.2d 860 (8th Cir. 1983), cert. denied 455 U.S. 1029 (1984); *Poe v. John Deere Co.*, 695 F.2d 1103 (8th Cir. 1982); *Brown v. St. Louis Police Department*, 691 F.2d 393 (8th Cir. 1982).

8. The undersigned counsel express their belief, based on a reasoned and studied professional judgment, that this appeal raises the following questions of exceptional importance:

a) Can litigants and/or their counsel, once sanctioned under Rule 11 for the entirety of their conduct in underlying litigation, be subjected to relitigation of those same issues in a subsequent malicious prosecution action, consistent with the doctrines of res judicata, election of remedies and collateral estoppel?

b) Are Rule 11 and malicious prosecution actions, arising out of the same nucleus of operative fact, the same claim for purposes of res judicata analysis?

c) Is a Rule 11 application a claim for purposes of res judicata analysis?

WHEREFORE, Appellants pray this Court for its Order allowing a rehearing en banc of its reversal of the District Court's order of dismissal, together with such other and further relief as this Court may deem just and proper in the premises. Owing to the severity of the consequences to the Appellees, that is, the resulting costs and hardships imposed upon Appellees in defending the instant malicious prosecution action and pending legal malpractice claims brought against the attorney Appeellees by the client Appellees, the prospect of vexations and seemingly endless litigation in similar cases throughout the Circuit, the issues raised in this appeal as stated herein, and the need to provide clear guidance to the Bar in future litigation, Appellees submit that this case is of great importance and worthy of the review of the Court of Appeals en banc.

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RESTATEMENT (SECOND) OF JUDGMENTS

§ 18. Judgment for Plaintiff—The General Rule of Merger

When a valid and final personal judgment is rendered in favor of the plaintiff:

(1) The plaintiff cannot thereafter maintain an action on the original claim or any part thereof, although he may be able to maintain an action upon the judgment; and

(2) In any action upon the judgment, the defendant cannot avail himself of defenses he might have interposed, or did interpose, in the first action.

§ 24. Dimensions of "Claim" for Purposes of Merger or Bar—General Rule Concerning "Splitting"

(1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

(2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

§ 25. Exemplifications of General Rule Concerning Splitting

The rule of § 24 applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action

(1) To present evidence or grounds or theories of the case not presented in the first action, or
(2) To seek remedies or forms of relief not demanded in the first action.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 11: Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion or other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed

promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a representative party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 58. Entry of Judgment

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

Rule 79. Books and Records Kept by the Clerk and Entries Therein

(a) Civil Docket. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the

Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

(b) Civil Judgments and Orders. The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Court with the approval of the Judicial Conference of the United States may prescribe, a correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept.

Rule 11; Federal Rules of Civil Procedure

NOTES OF ADVISORY COMMITTEE ON RULES

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1983 Amendment

Since its original promulgation, Rule 11 has provided for the striking of pleadings and the imposition of disciplinary sanctions to check abuses in the signing of pleadings. Its provisions have always applied to motions and other papers by virtue of incorporation by reference in Rule 7(b)(2). The amendment and the addition of Rule 7(b)(3) expressly confirms this applicability.

Experience shows that in practice Rule 11 has not been effective in deterring abuses. See 6 Wright & Miller, Federal Practice and Procedure: Civil § 1334 (1971). There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions. See Rodes, Ripple & Mooney, Sanctions Imposable for Violations of the Federal Rules of Civil Procedure 64-65, Federal Judicial Center (1981). The new language is intended to reduce the reluctance of courts to impose sanctions, see Moore, Federal Practice ¶ 7.05, at 1547, by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions.

The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation. *See, e.g., Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); Hall v. Cole, 412 U.S. 1, 5 (1973). Greater attention by the district courts to pleading and motion abuses and the im-

position of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.

The expanded nature of the lawyer's certification in the fifth sentence of amended Rule 11 recognizes that the litigation process may be abused for purposes other than delay. *See, e.g., Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977).

The words "good ground to support" the pleading in the original rule were interpreted to have both factual and legal elements. *See, e.g., Heart Disease Research Foundation v. Gneral Motors Corp.*, 15 Fed.R.Serv.2d 1517, 1519 (S.D.N.Y.1972). They have been replaced by a standard of conduct that is more focused.

The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances. *See Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 365 F.Supp. (E.D.Pa.1973). This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation. *See Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir. 1980).

The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he

depended on forwarding counsel or another member of the bar.

The rule does not require a party or an attorney to disclose privileged communications or work product in order to show that the signing of the pleading, motion, or other paper is substantially justified. The provisions of Rule 26(c), including appropriate orders after in camera inspection by the court, remain available to protect a party claiming privilege or work product protection.

Amended Rule 11 continues to apply to anyone who signs a pleading, motion, or other paper. Although the standard is the same for unrepresented parties, who are obliged themselves to sign the pleadings, the court has sufficient discretion to take account of the special circumstances that often arise in pro se situations. *See Haines v. Kerner*, 404 U.S. 519 (1972).

The provision in the original rule for striking pleadings and motions as sham and false has been deleted. The passage has rarely been utilized, and decisions thereunder have tended to confuse the issue of attorney honesty with the merits of the action. See generally Risinger, Honesty in Pleading and its Enforcement: Some "Striking" Problems with Fed.R.Civ.P. 11, 61 Minn.L.Rev. 1 (1976). Motions under this provision generally present issues better dealt with under Rules 8, 12, or 56. *See Murchison v. Kirby*, 27 F.R.D. 14 (S.D.N.Y. 1961); 5 Wright & Miller, Federal Practice and Procedure: Civil § 1334 (1969).

The former reference to the inclusion of scandalous or indecent matter, which is itself strong indication that an improper purpose underlies the pleading, motion, or other paper, also has been deleted as unnecessary. Such matter may be stricken under Rule 12(f) as well as dealt with under the more general language of amended Rule 11.

The text of the amended rule seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless

by insuring that the rule will be applied when properly invoked. The word "sanctions" in the caption, for example, stresses a deterrent orientation in dealing with improper pleadings, motions or other papers. This corresponds to the approach in imposing sanctions for discovery abuses. *See National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976) (per curiam). And the words "shall impose" in the last sentence focus the court's attention on the ned to impose sanctions for pleading and motion abuses. The court, however, retains the necessary flexibility to deal appropriately with violations of this rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted.

The reference in the former text to wilfulness as a prerequisite to disciplinary action has been deleted. However, in considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorney's or party's actual or presumed knowledge when the pleading or other paper was signed. Thus, for example, when a party is not represented by counsel, the absence of legal advice is an appropriate factor to be considered.

Courts currently appear to believe they may impose sanctions on their own motion. *See North American Trading Corp. v. Zale Corp.*, 73 F.R.D. 293 (S.D.N.Y. 1979). Authority to do so has been made explicit in order to overcome the traditional reluctance of courts to intervene unless requested by one of the parties. The detection and punishment of a violation of the signing requirement, encouraged by the amended rule, is part of the court's responsibility for securing the system's effective operation.

If the duty imposed by the rule is violated, the court should have the discretion to impose sanctions on either the attorney, the party the signing attorney represents, or both,

or on an unrepresented party who signed the pleading, and the new rule so provides. Although Rule 11 has been silent on the point, courts have claimed the power to impose sanctions on an attorney personally, either by imposing costs or employing the contempt technique. See 5 Wright & Miller, *Federal Practice and Procedure*: Civil § 1334 (1969); 2A Moore, *Federal Practice* ¶ 11.02, at 2104 n.8. This power has been used infrequently. The amended rule should eliminate any doubt as to the propriety of assessing sanctions against the attorney.

Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client. *See Browning Debenture Holders' Committee v. DASA Corp., supra.* This modification brings Rule 11 in line with practice under Rule 37, which allows sanctions for abuses during discovery to be imposed upon the party, the attorney, or both.

A party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so. The time when sanctions are to be imposed rests in the discretion of the trial judge. However, it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is decided or shortly thereafter. The procedure obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration. In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.

To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition

of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record. Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.

Although the encompassing reference to "other papers" in new Rule 11 literally includes discovery papers, the certification requirement in that context is governed by proposed new Rule 26(g). Discovery motions, however, fall within the ambit of Rule 11.

1987 Amendment

The amendments are technical. No substantive change is intended.

(2)

No. 91-96

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

DAVID G. LUPO, JAMES STEMMLER, JANE S. TSCHUDY, THOMAS W. YAGER, MICHAEL J. KICKHAM, E. LOUIS WERNER, AND RONALD B. BURT,

Petitioners,

v.

IRVING COHEN, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENT IRVING COHEN IN OPPOSITION

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QUESTION PRESENTED

Did the Eighth Circuit correctly rule that an action for malicious prosecution is not barred under the doctrine of *res judicata* by a prior application for Rule 11 sanctions in the underlying lawsuit?

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No. 91-96

In The

Supreme Court of the United States

October Term, 1991

DAVID G. LUPO, JAMES STEMMLER, JANE S. TSCHUDY, THOMAS W. YAGER, MICHAEL J. KICKHAM, E. LOUIS WERNER, AND RONALD B. BURT,

Petitioners,

v.

IRVING COHEN, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENT IRVING COHEN IN OPPOSITION

INTRODUCTION

This case presents the question of whether a motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure operates to bar a subsequent diversity suit for malicious prosecution. The Eighth Circuit answered that question in the negative, holding that "Rule 11 cannot abridge the substantive state law of malicious prosecution, nor was it adopted to serve as a surrogate for an action based upon a claim of malicious prosecution

resulting from frivolous harassing or vexatious litigation." (4a)[1] The decision below was a correct application of well-settled *res judicata* principles; it raises no novel question warranting plenary review by this Court.

STATEMENT OF THE CASE

Respondent Irving Cohen's malicious prosecution claim is based on a frivolous thirteen-count complaint filed against him in 1982 by attorneys David A. Lupo and James Stemmler on behalf of eight individual plaintiffs (the "*Bastien* case"). After four years of discovery the trial court granted summary judgment in favor of respondent and every other defendant, finding that plaintiffs had no probative evidence to support any of their allegations. *Bastien v. R. Rowland & Co.*, 631 F. Supp. 1554 (E.D. Mo. 1986), *aff'd*, 815 F.2d 713 (8th Cir. 1987), *cert. denied*, 484 U.S. 854 (1987). The court explained (at 1559):

> Since the essence of defendant's motions [for summary judgment] lay in plaintiffs' failure to produce any evidence in support of their claims, the Court admonished plaintiffs to come forward at the outset of trial with *anything* that would satisfy the Rule 56(e) burden on a non-moving party on motion for summary judgment.
>
> Trial proceeded for three-and-a-half days, during which time plaintiffs completed the direct examination of one witness. At that point the Court recessed the action. Plaintiffs were

[1] The reference in the text is to the Appendix to the Petition for Writ of Certiorari.

> granted an additional ten days to file materials in opposition to defendants' motion prior to a hearing on March 31st. At the hearing plaintiffs argued fervently for their legal theories but once again failed to come forward with any evidence that supported any underlying fact of their complaint. The court therefore granted defendants' motions from the bench. [emphasis in original.]

Cohen and the other *Bastien* defendants then jointly moved for an award of Rule 11 sanctions against the Lupo & Stemmler lawyers and the *Bastien* plaintiffs. The court granted that motion. *Bastien v. R. Rowland & Co.*, 116 F.R.D. 619, 621 (E.D. Mo. 1987), *aff'd sub nom., Lupo v. R. Rowland & Co.*, 857 F.2d 482 (8th Cir. 1988), *cert. denied*, 490 U.S. 1081 (1989). (41a) Finding that after the *Bastien* case was assigned to him in 1985, the litigation had been "conducted . . . in a manner that escalated costs unnecessarily and vexatiously," *id.* at 621 (42a), District Judge Gunn decided that "a partial fee award is appropriate in this case." *Id.* at 620. (40a)

In reaching that result, Judge Gunn specifically declined to make findings as to the reasonableness of the attorney's fees and litigation expenses incurred by Irving Cohen. Fixing the aggregate sanction payable to all 32 defendants at $100,000, Judge Gunn held –

> $100,000 represents a fraction of the fees and costs in this suit. The Court will not, therefore, engage in a determination of the reasonableness of particular fees and costs charged to its defense. The Court finds the amount *appropriate as a sanction* for bad faith conduct on the part of plaintiffs and their counsel.

116 F.R.D. at 622. (43a) (emphasis added.)

On appeal, the Eighth Circuit affirmed. The appellate court held that "[o]ur review of the facts reveals overwhelming support for the imposition of the sanctions," and found that their amount "was certainly well within the parameters of reasonability. . . . " *Lupo v. R. Rowland & Co.*, 857 F.2d 482, 486 (8th Cir. 1988), *cert. denied*, 490 U.S. 1081 (1989). (34a)

Thereafter, in October 1988, respondent Cohen filed the instant malicious prosecution lawsuit against the *Bastien* plaintiffs and their attorneys. The district court dismissed the complaint, finding that the claim was barred by *res judicata*. The Eighth Circuit reversed concluding that Cohen's malicious prosecution claim was not actually litigated and could not have been properly raised and determined in the *Bastien* litigation. (3a) In addition, the court held that the imposition of rule 11 sanctions could not bar Cohen's malicious prosecution claim because "Rule 11 cannot abridge the substantive state law of malicious prosecution." (4a)

THE PETITION SHOULD BE DENIED

A. There is No Conflict Among the Circuits

Every federal court which has considered the issue has determined that a motion for Rule 11 sanctions is not a claim of the kind that would trigger application of the doctrine of *res judicata*. There are no reported decisions in which a court has accorded *res judicata* effect to a motion for Rule 11 sanctions.

The Ninth Circuit has specifically held that denial of a Rule 11 motion does not bar a subsequent civil claim for

malicious prosecution. *Amwest Mortgage Corp. v. Grady*, 925 F.2d 1162, 1165 (9th Cir. 1991). In *Amwest*, the defendant in a state court malicious prosecution action sought a federal court injunction to stay the state case based on the federal court's earlier denial of Rule 11 sanctions in the underlying lawsuit. The district court rejected this proposition; the Ninth Circuit affirmed reasoning that a Rule 11 proceeding does not give the parties a fair opportunity to fully litigate the disputed issues.[2]

The Fifth Circuit has similarly held that Rule 11 does not create an independent cause of action for bad faith litigation – *i.e.*, that Rule 11 does not create a "claim" that could trigger application of *res judicata* in a subsequent suit. *Port Drum Co. v. Umphrey*, 852 F.2d 148, 150 (5th Cir. 1988). Applying a similar rationale in *Lenoir v. Tannehill*, 660 F. Supp. 42, 44 (S.D. Miss. 1986), the court held that a party cannot counterclaim for Rule 11 sanctions.

The decision below is fully consistent with the *Amwest* and *Port Drum* decisions of the Ninth and Fifth Circuits.

B. The Decision Below is in Accord With This Court's Interpretation of Rule 11

While this Court has not directly addressed the precise issue of whether Rule 11 motions may have *res*

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[2] The Federal District Court for the Eastern District of Pennsylvania has also rejected the argument that an earlier denial of Rule 11 sanctions is a *res judicata* bar to an action for malicious prosecution. *American International Airways, Inc. v. American International Group, Inc.*, Civ. A. No. 90-7135, slip op. (E.D. Pa. May 21, 1991).

judicata effect in a subsequent malicious prosecution lawsuit, the decision below is consistent with this Court's recent interpretations of Rule 11 as a procedural device to deter the filing of baseless lawsuits.

Cooter & Gell v. Hartmarx Corporation, ___ U.S. ___, 110 S. Ct. 2447, 2453 (1990), held that Rule 11 must be interpreted in light of the Rules Enabling Act, 28 U.S.C. § 2072, which allows this Court to adopt procedural rules which do not abridge the litigants' substantive rights.[3] Justice O'Connor, writing for the majority, concluded, "It is now clear that the central purpose of Rule 11 is to deter baseless filings in District Court and thus, consistent with the Rule Enabling Act's grant of authority, streamline the administration and procedure of the federal courts." 110 S. Ct. at 2454. The Court further indicated that the imposition of Rule 11 sanctions would not create a *res judicata* bar against the offending party's underlying claim: "Even if a district court indicated that a complaint was not legally tenable or factually well founded for Rule 11 purposes, the resulting Rule 11 sanction would nevertheless not preclude the refiling of a complaint." 110 S. Ct. at 2456.

In *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, ___ U.S. ___, 111 S. Ct. 922, 933 (1991), the petitioner argued that Rule 11 violated the Rules Enabling Act because it "effectively creates a federal tort of malicious prosecution, thereby encroaching upon various state law causes of action." This Court rejected petitioner's argument holding:

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[3] The Act expressly provides, 28 U.S.C. § 2072: "Such rules shall not abrige, enlarge or modify any substantive rights. . . . "

> The main objective of the Rule is not to reward parties who are victimized by litigation; it is to deter baseless filings and curb abuses. Imposing monetary sanctions on parties that violate the Rule may confer a benefit on other litigants, but the Rules Enabling Act is not violated by such incidental effects on substantive rights. *Additionally, we are confident that District Courts will resist the temptation to use sanctions as substitutes for tort damages.*

111 S. Ct. at 934 (emphasis added, citations omitted).

Employing a similar rationale in *Chambers v. Nasco, Inc.*, ___ U.S. ___, 111 S.Ct. 2123, 2134 (1991), the Court held that Rule 11 and other statutes and rules providing for sanctions do not displace a court's common law inherent power to impose sanctions for bad faith conduct. *See also Port Drum*, 852 F.2d at 150 (Rule 11 "is no more a 'law' under which a cause of action may arise than are its companion rules"); *Chris & Todd, Inc. v. Arkansas Department of Finance & Administration*, 125 F.R.D. 491, 493-94 (E.D. Ark. 1989) ("Rule 11 sanctions are not to be deemed a substitute for an action for malicious prosecution").

C. The Decision Below Correctly Applied Traditional Notions Of Res Judicata

(1) Essentially disregarding the cases discussed above, petitioners have attempted to create a conflict by arguing that the Eighth Circuit ignored a substantial body of law regarding the doctrine of *res judicata*. That argument is not well taken.

Under the doctrine of *res judicata*, "[a] final judgment on the merits of an action precludes that parties or their

privies from relitigating issues that were or could have been raised in that action." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). In the instant case, Missouri law, which governs Cohen's malicious prosecution claim, does not permit counterclaims for malicious prosecution. *Wright v. Mullen*, 659 S.W.2d 261, 263 (Mo. App. 1983). Therefore, Cohen's claim did not even accrue until the litigation was terminated in his favor and the *Bastien* plaintiffs' appeals were decided. *Ripley v. Bank of Skidmore*, 355 Mo. 897, 198 S.W.2d 861, 866 (Mo. 1947); *Stix & Co. v. First Missouri Bank & Trust Co.*, 564 S.W.2d 67, 70 (Mo. App. 1978). Respondent's malicious prosecution claim, in short, could not have been adjudicated in the *Bastien* case.

(2) In addition, a proceeding for the imposition of Rule 11 sanctions is entirely different than a suit for an award of malicious prosecution damages. Rule 11 is an exclusively federal remedy which must be invoked by filing a motion in a pending lawsuit or by the court, *sua sponte*. *See, e.g., Lyles v. K Mart Corp.*, 703 F. Supp. 435 (W.D.N.C. 1989). Malicious prosecution is a state common law tort which must be brought by civil complaint.

Under Missouri law, a malicious prosecution claimant is entitled to the normal range of discovery options, pretrial motions practice, and a trial by jury. *Haswell v. Liberty Mutual Insurance Co.*, 557 S.W.2d 628 (Mo. 1977). In contrast, a motion for Rule 11 sanctions must be determined at a hearing (not a trial) by a judge (not a jury) with limited or no discovery. (132a). *See Shelton v. American Motors*, 805 F.2d 1323 (8th Cir. 1986). It was these procedural differences between a Rule 11 motion and a civil tort lawsuit which led the Ninth Circuit to conclude

that Rule 11 proceedings do not have a *res judicata* effect in a subsequent action for malicious prosecution. *Amwest v. Grady*, 925 F.2d at 1165.

(3) There are also fundamental differences in the allowable relief under Rule 11 and in a malicious prosecution suit. Malicious prosecution is a tort action, the purpose of which is to fully compensate the plaintiff for injuries suffered as a result of wrongfully initiated litigation. Once the elements of the tort are established, the plaintiff is entitled to recover all losses caused by the wrongful lawsuit, including attorneys' fees and consequential damages. *Haswell*, 557 S.W.2d at 637-638. If malice is proved, the plaintiff has the right to ask the jury for a punitive damage award as well. *Proctor v. Stevens Employment Services, Inc.*, 712 S.W.2d 684, 687 (Mo. 1986) (en banc).

By way of contrast, Rule 11's "central purpose . . . is to deter baseless filings in District Court. . . . " *Cooter & Gell*, 110 S. Ct. at 2454. "Rule 11 is not a fee-shifting statute. . . . A movant under Rule 11 has no entitlement to [attorney's] fees or any other sanction. . . . " *Cooter & Gell*, 110 S.Ct. at 2462 (quoting American Judicature Society, Rule 11 Transition, The Report of the Third Circuit Task Force on Federal Rules of Civil Procedure 11, at 49 Burbank 1989).

> Rule 11 sanctions are not to be deemed a substitute for an action for malicious prosecution. Such sanctions are not intended to make the moving party 'whole' for any and all damages he or she may have sustained by virtue of the malicious prosecution of a meritless claim.

Chris & Todd, Inc., 125 F.R.D. at 493-494 (E.D. Ark. 1989).

In fact, appropriate relief under Rule 11 includes non-monetary sanctions, *e.g.*, oral warnings, *Taylor v. Pennsylvania*, 686 F. Supp. 492, 503 (M.D. Pa. 1988); reprimands in open court, *Unanue-Casal v. Unanue-Casal*, 898 F.2d 839, 842 (1st Cir. 1990); public censure, *Pony Express Courier Corporation of America v. Pony Express Delivery Service*, 872 F.2d 317, 319 (9th Cir. 1989); compulsory education, *Henderson v. Dept. of Public Safety*, 901 F.2d 1288, 1291 (5th Cir. 1990); dismissal of the complaint, *Murray v. Dominick Corporation of Canada, Ltd.*, 117 F.R.D. 512 (S.D.N.Y. 1987); and injunctions against filing additional suits without the court's permission, *Damiani v. Adams*, 657 F. Supp. 1409 (S.D. Cal. 1987).

The permissible monetary sanctions under the rule may fall short of full compensation and cannot include consequential damages. *Business Guides*, 111 S. Ct. at 934. As happened in the instant case, many courts have ordered that the aggrieved party be paid less than its reasonable attorney's fees, *e.g.*, *Hilton Hotels Corp. v. Banov*, 899 F.2d 40 (D.C. Cir. 1990) ($5,000 sanction imposed although $68,000 in legal fees had been incurred); *International Shipping Co. v. Hydra Offshore, Inc.*, 875 F.2d 388, 393 (2nd Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 563 (1989) ($10,000 sanction, $48,000 in legal fees); *Stewart v. American International Oil & Gas Co.*, 845 F.2d 196, 202 (9th Cir. 1988); *Unified Services Funds v. Ward*, 121 F.R.D. 673, 678 (D. Alaska 1988); *Doe v. Keane*, 117 F.R.D. 103 (W.D. Mich. 1987); *Muraoka v. American Osteopathic Association*, 117 F.R.D. 616 (N.D. Ill. 1987) (50% or less of the aggrieved parties' fees).

The above decisions are specific illustrations of the principle that compensation or fee-shifting is not the purpose of Rule 11 sanctions. See *Cooter & Gell*, 110 S. Ct. at 2462. *Accord, White v. General Motors Corp.*, 908 F.2d 675, 685 (10th Cir. 1990); *Spiller v. Ella Smithers Geriatric Center*, 919 F.2d 339, 347 (5th Cir. 1990); *In re Kunstler*, 914 F.2d 505, 522 (4th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1607 (1991); *Traina v. United States*, 911 F.2d 1155, 1158 (5th Cir. 1990); *Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor*, 875 F.2d 1224, 1229 (6th Cir. 1989); *Doering v. Union County Board of Chosen Freeholders*, 857 F.2d 191, 194 (3rd Cir. 1988); *Brown v. Federation of State Medical Boards*, 830 F.2d 1429, 1437 (7th Cir. 1987).

In sum, the remedial discretion of a judge in assessing sanctions to deter baseless litigation fundamentally differentiates a Rule 11 proceeding from a tort action for malicious prosecution, where full compensatory damages must be awarded – even to the extent of shifting all of the plaintiff's attorney's fees to the malicious prosecution defendant. The decision below correctly applied that distinction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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